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# HEAD OF STATE IMMUNITY

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Y 4. B 22/1:103-104

Head of State Immunity, Serial No....

## HEARING

BEFORE THE

### COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS

### HOUSE OF REPRESENTATIVES

### ONE HUNDRED THIRD CONGRESS

FIRST SESSION

---

DECEMBER 9, 1993

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Printed for the use of the Committee on Banking, Finance and Urban Affairs

**Serial No. 103-104**



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## HEAD OF STATE IMMUNITY

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THURSDAY, DECEMBER 9, 1993

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS,  
*Washington, DC.*

The committee met, pursuant to notice, at 10 a.m., in room 2128, Rayburn House Office Building, Hon. Henry B. Gonzalez [chairman of the committee] presiding.

Present: Chairman Gonzalez, Representatives Frank, Leach, and Roth.

The CHAIRMAN. The committee will please come to order.

Let me start out by saying that this is the first in a series of hearings aimed at focusing attention on various abuses of our financial system which continue unabated. There is no doubt in my mind that at this very moment there are other BNLs and BCCIs that are abusing the system. It is just a question of circumstances and then the eruption into loud public notoriety for awhile, but we are more concerned with the fundamental problem that we as a nation have very real and present.

The committee has a responsibility to make sure that the government and, of course, the policymaking body, the Congress, has taken the necessary steps to root out abuses of our financial system, whether this be in the form of offshore money laundering, which is still a very, very huge activity, which dovetails with practices that were revealed very loudly attentionwise in the case of the BNL and BCCI.

The second hearing in the series will focus on counterfeiting. We have had some hearings on that before, its effect on safety and soundness and the ability to actually conduct sound monetary policy. The counterfeiting hearing will be held in late January when we come back to open the Second Session of the Congress.

At the very outset, I do want to make it clear that the committee is not here to take sides in the disputes that have legal or judicial connotations which, of course, overshadow today's hearing. We never have, at least as long as I have been chairman. We have scrupulously adhered to the rules of the House, the constitutional limitations that guide those rules, and have not indulged in either fishing expeditions or in any type of persecutory or judicial branch involvement, or for that matter, in the case involving jurisdictions shared with other committees, such as, for example, today's hearing on the diplomatic front. Well, those issues we are referring to the Committee on Foreign Affairs.

In the case of the Agricultural Commodity Credit Guarantee Program, we brought in—in fact, when we had that, this committee

shared jurisdiction with the Agriculture Committee. The courts are the proper forum to decide the issue that confronts the Justice Department at this time, as well as the State Department, and, of course, we are not in any way desirous, nor feel equipped, to even comment on that aspect. We are strictly looking at it from the standpoint of the impact on the safety and soundness of our banking and financial system.

The committee is meeting because I am concerned about how a grant to a head of a State in the way of immunity would impact the safety and soundness of the U.S. banking system, because there are many ramifications to this question of sovereign immunity that go beyond the mere immunity for a head of State. In this case, Sheikh Zayed's recent request for head of State immunity raises the fundamental question of whether a head of State or his nominees can violate U.S. banking laws and regulations and then use their political clout, to say the least, to escape accountability for their actions.

I have long championed efforts to ensure greater oversight of foreign involvement in the U.S. financial system years ago, more than 25 years ago, especially participation by foreign government-backed entities, which is the majority. The recent BCCI and BNL scandals, which we brought to light actually and started from the very beginning, very similar to today's hearing, not much attention or interest demonstrated—and they should serve as a painful example of how vulnerable our financial system is to abuse by forces and individuals outside of our continental jurisdictions—granting immunity to the sheikh and his nominees because this involves, as I said before, very intricate questions that have to do with accountability in the case of infractions involving our banking laws.

At this point, it would send exactly the wrong signal to similar persons wishing to engage in nefarious financial activities in our country. I do understand that there may be diplomatic arguments to the contrary, but they were that way in the case of Iraq and the BNL, ensuring that heads of States are held to the same standards as other participants in the financial system should be our top priority.

Because of the potential precedent of permitting a head of State to escape accountability for violations of U.S. banking laws and regulations, I am opposed to the granting of immunity to the Sheikh. I have sent letters to the Secretary of State and Judge Green expressing our objection, and I ask unanimous consent that those letters be printed in the record at this point.

[The letters referred to can be found in the appendix.]

I am very disappointed that the State and Justice Departments have refused, and this only lately—we had been led to believe that there would be some cooperation and participation—to take a public stand against potential abuse of our financial system by testifying here today. Given their lack of leadership, I have asked the committee staff to study the issue of whether or not legislation is needed to ensure that heads of States are held accountable for the participation in the U.S. financial system.

I might add that we simply have not closed out as a committee, and certainly I as a chairman, the BNL, BCCI, or for that matter, we have yet to issue, at least whether we call it a staff or a chair-

man's report, on the savings and loan and banking situations. There seems to be a complacency and a smugness at this point, but as I see it, we are not out of the shadows in our country, and it wouldn't take much to knock down the house of cards that has been building up here, and this committee has a responsibility, prime responsibility. And therefore, we will, with our limited ability, for instance staffwise—at peak points last year and the year before when we were shaping legislation at the end of the session—of the Congress, staffs were working round the clock day and night over the weekend.

To give you an idea, our Banking Committee has a budget about half of the budget given the Energy and Commerce Committee, and I am not complaining. We asked for a 2 percent increase this last January and were refused. We have about one-third the number of staffers for the full committee majority that the Energy and Commerce Committee has. So given that, the only thing we ask is that we be given a modicum of assistance so that we can meet head on these multifarious forms of problems and issues that we must address and at least gather information in order to guide us in shaping legislation of such, if necessary.

And with that, I yield to Mr. Leach.

Mr. LEACH. I thank the chairman. As usual, he has chosen to hold a timely hearing. I would only make two quick observations that relate to the rule of law.

Whether any American is above the law was settled very firmly with Watergate. Whether any foreigner is above the law in terms of commercial activity was settled by statute in the Foreign Sovereign Immunities Act. I don't think it is the prerogative of this committee or Congress to determine whether a law has been violated and whether there is criminal activity. That is for the Third Estate and the Second Estate to involve itself in.

But I think it is very clear that from a congressional perspective, a mere articulation of the American value that no one is above the law is very important. I think this hearing is intended to underscore that point.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Roth, do you have any statement?

Mr. ROTH. Well, I will just briefly, Mr. Chairman, I want to again compliment you for your integrity and your courage. Every time that I need an infusion of courage, I just look at your example.

I see that you took on the entire government again, Mr. Chairman, where they told you not to have—or asked you not to have this hearing and you proceeded, and you are certainly a breath of fresh air in this government when we have one person that will move ahead no matter what the political consequences. I want to congratulate you on that personally.

Mr. Chairman, this hearing is very interesting. We must get at the truth of the BCCI case for reasons that you and ranking Member Leach have mentioned. The issue of immunity against a lawsuit involves a Gulf war ally and at the same time involves, well, the BCCI scandal, and I see that a lot of this BCCI testimony we have had, we have never really gotten at the total truth, Mr. Chairman. We have never really had a clearing of the air, and I was hoping that the State Department, the Justice Department,

would cooperate with you this morning so that we would be able to say these are the facts in the case and now we can move forward or these are the decisions we have to make.

Absent compelling mitigating circumstances, we must, I think, you know, prosecute all illegal activity to the fullest extent of the law and let the chips fall where they may.

There is no question that BCCI has admitted it acquired First American illegally in violation of U.S. banking law. This is very serious, and when I see people getting off because they have the best lawyers and the like, that certainly doesn't do anything for our jurisprudence and, quite frankly, doesn't do anything to engender respect for the law which we have to have. As the ranking Member said, no American all the way from the President on down is above the law, and I think that that must be the case in BCCI too.

So, Mr. Chairman, I compliment you for having this hearing and I compliment you for having the integrity and the courage and the tenacity to go ahead with the hearing even when the most powerful people in our government ask you not to.

Thank you.

The CHAIRMAN. Well, thank you very much, Mr. Roth. I sincerely appreciate those very generous words.

Our first panel consists of our distinguished general counsel of the Board of Governors of the Federal Reserve, Mr. Mattingly, and we had placed seats in what we thought were going to be nameplates for the Justice and the State Department, so those are vacant. But we want to thank Mr. Mattingly very much for his quick response to our invitation and his presence here.

Mr. Mattingly, you may proceed as you deem best.

#### **STATEMENT OF VIRGIL MATTINGLY, GENERAL COUNSEL, BOARD OF GOVERNORS OF THE RESERVE**

Mr. MATTINGLY. Thank you very much, Mr. Chairman.

Mr. Chairman, I am pleased to appear today before the committee to testify in connection with the committee's hearing into recent requests that Sheikh Zayed al-Nahyan and two of his adult sons be granted head of State immunity in connection with pending civil litigation against them and others. Mr. Chairman, I take it my full statement will be put in the record.

The CHAIRMAN. Yes. Pardon me. I should have announced that the statements that we received in time, like yours, to have studied all last night, will be in the record as you gave them to us, and you may proceed as you deem best.

Mr. MATTINGLY. I will try to summarize it. It shouldn't take too long.

The litigation was initiated by the holding company for the former First American Bank, and seeks damages related to the unlawful acquisition of the First American Bank by BCCI. Sheikh Zayed is the President of the United Arab Emirates and the ruler of Abu Dhabi, one of the seven emirates that make up the UAE. He was also a principal shareholder of BCCI and First American.

Mr. Chairman, you have asked me to summarize briefly the BCCI matter and the board's enforcement actions related to BCCI. As has been described at prior hearings before this and other committees, BCCI engaged in a complex and multi-billion-dollar fraud

on a worldwide basis. In the United States, BCCI acquired secret control of several banks without prior regulatory approval, including the First American Bank. BCCI acquired these banks through nominees who were financed and compensated by BCCI.

Upon uncovering these unlawful acquisitions, the Federal Reserve initiated a series of enforcement actions against BCCI and individuals and entities related to BCCI. These actions to date have resulted in the assessment and collection of millions of dollars in civil money penalties and the prohibition of a number of individuals from the banking business in the United States. The details of these enforcement actions, some of which are still pending, are spelled out in my prepared remarks.

Most significantly, the Federal Reserve, acting with the assistance of the Department of Justice and the New York County district attorney, sought the appointment of an independent trustee to carry out the Board's order requiring the divestiture of BCCI's interest in the First American Bank. This divestiture has now been accomplished by the trustee, Mr. Albright, without loss to the Federal Deposit Insurance Fund and with the forfeiture to the United States of BCCI's illegal interests—or BCCI's interest in the proceeds of that sale, which we think will be quite substantial.

Mr. Chairman, I would like to say that Mr. Albright stepped in and agreed to become the trustee at a very difficult and dark time when it was not clear at all how this matter was going to be resolved, and certainly the Federal Reserve owes a great deal of gratitude to Mr. Albright and to Senator Mathias and the other members of the Board of Directors for ensuring that that bank was sold without damage.

The Abu Dhabi ruling family had substantial ownership interests in both BCCI and the First American Bank. At this time, none of the Federal Reserve's pending enforcement action names the Abu Dhabi ruling family or the Abu Dhabi investment authority, which also owns stock of First American. The Federal Reserve has not, however, had access to all of the evidence relating to the ownership of shares of the First American Bank by members of the Abu Dhabi ruling family and has requests, unanswered requests, outstanding for access to witnesses and documents in Abu Dhabi.

I should point out, however, that prior to its seizure, the BCCI seizure, Abu Dhabi had granted Federal Reserve investigators access to many of the documents evidencing the BCCI fraud with respect to First American and the Independence Bank and these documents were very important to our enforcement actions.

They also provided financial support for First American and supported the Federal Reserve's efforts for a trust. We are continuing at the Federal Reserve to pursue all relevant information related to the ownership of shares of the First American Holding Co., and its illegal acquisition by BCCI.

As I stated, Sheikh Zayed and his sons have moved to be dismissed as defendants in the First American civil lawsuit, asserting, as we understand it, that he is the head of State of the United Arab Emirates and that under the doctrine of head of State immunity, he and his immediate family are not subject to lawsuits in this country.

Sheikh Zayed, as I understand it, is claiming that head of State immunity is absolute and that there is no exception for commercial activity by the head of State in this country, and as Congressman Leach pointed out, there is an exception from sovereign immunity in the Foreign Sovereign Immunities Act when you have commercial activity in the United States by a foreign government agency. Sheikh Zayed is saying that that exception does not apply, however.

We understand that the State Department has been asked to express a view on this request for immunity. The Board is not a party to the civil litigation and has not taken a position on the head of State immunity issue. The staff of the State Department has, however, requested the views of the Board's staff on the possible effects on the Board's regulatory powers if this immunity request were granted.

If, as a result of the Board's ongoing investigation into BCCI matters, a formal enforcement action were to be taken against the ruler of Abu Dhabi or his sons, it is very possible that the Board's ability to prosecute such an action could be impaired if immunity were granted.

As we understand it, the scope of head of State immunity has not been precisely defined, but it is possible that if such immunity were granted, it could be interpreted as affording complete protection against any type of civil action in this country, including a regulatory enforcement action by the Federal Reserve.

Moreover, it is not clear whether the grant of head of State immunity to the ruler would cover his two sons, his two adult sons who were also shareholders in First American. We are not aware of any in the past where a bank regulatory agency sought to take formal enforcement action against a foreign head of State, and therefore we have no precedent to draw on.

With regard to the more general question, a grant of immunity to a head of State who owns or controls a bank operating in this country could restrict the Board's ability to ensure compliance with the Nation's banking laws since, as noted, in such a case the Board could be barred from taking enforcement action against the head of State related to his ownership or control of a U.S. bank.

Because of this potential limitation on the existence of a vital regulatory tool, the issue of head of State immunity would be a significant factor in any application by a head of State to acquire a U.S. bank unless there was an effective waiver of immunity by the head of State. However, as far as we have been able to determine, based on available data, no head of State or member of the household of a head of State at present owns 5 percent or more of the shares of a U.S. bank or a foreign bank with operations in the United States.

As this committee is aware, there are a number of banking organizations operating in this country that are owned by foreign government entities. Under the Foreign Sovereign Immunities Act, a foreign government entity is not immune from civil liability for its commercial activity in this country.

We believe that this commercial activity exception should include the acquisition and control of U.S. banks or the conduct by a foreign bank of activities in this country. Accordingly, under this view

of the Foreign Sovereign Immunities Act, we believe that a defense of sovereign immunity should not interfere with the effective regulation of the operations of foreign government-owned banks in this country by the Federal Reserve. In this regard, the defense of sovereign immunity has not been raised in any of the enforcement actions taken to date by the Board against foreign government-owned banks.

I would be happy to respond to any questions the committee might have.

[The prepared statement of Mr. Mattingly can be found in the appendix.]

The CHAIRMAN. Thank you very much, Mr. Mattingly.

You mentioned that you were having some difficulty in obtaining documentation. BCCI operated in about 72 countries. You say that you had difficulty in obtaining access to BCCI bank documents overseas.

Have the bank secrecy laws of foreign jurisdictions impeded the Fed's access to documents required for the investigation?

Mr. MATTINGLY. Absolutely. We have requests outstanding for access to documents in banks in foreign countries which have been denied because of these secrecy laws.

The CHAIRMAN. You stated the argument is advanced that this is sovereign immunity. It is a head of State, and his immediate relatives or family, members of the court you could say. However, staff has given me this chronology, and on June 25 of this year, First American filed a \$1½ billion civil racketeering suit against Sheikh Zayed and other members of Abu Dhabi's ruling family. Al-Sharqui, a member of the UAE Government, Sheikh Nuaimi, also known as Sheikh Humaid, the ruler of the Ajman Emirate, and others, Clark Clifford, Robert Altman, and others affiliated with BCCI.

Now, they advanced the argument not of sovereign but subject immunity, as subjects of the sovereign, that they also would extend the doctrine of sovereign immunity to cover them. Well, this is reminiscent of the Nuremberg hearings in which the former German military officials were saying that they were merely obedient soldiers; they were following orders. And this is what the Sheikh is advancing in his argument, as I understand it from staff, and the subjects, that they were merely carrying out the orders of the sovereign and therefore they partake of this immunity.

So it is a more complex issue than just the head of State immunity involvement, and you are aware of that attempted derivative defense.

A recent survey has indicated that of the 25 richest people in the world, 6 are members of ruling families and thus might assert a claim of head of State immunity in the same way as now. Currently, heads of State are not required to identify themselves as such as shareholders and as they are as a list submitted to you, the Federal Reserve, given the wealth of these many foreign rulers, do you or the Fed have any plans to change this policy and ask the heads of State to identify themselves?

Mr. MATTINGLY. Yes, sir, we are going to consider that. We have looked through the lists to determine to the best of our ability whether there are any heads of States that own more than 5 per-

cent of a U.S. bank and we haven't been able to determine that. Of course, if the head of State of a foreign country or anyone wants to acquire more than 10 percent of the shares of a U.S. bank, they have to file an application with the Fed or one of the other agencies, and in that application it would identify whether they were a head of State, and we could get at it that way.

The CHAIRMAN. I see. OK.

There toward the end of your testimony you mention that the Federal Reserve could avert future head of State problems by requiring a waiver of immunity as a condition for approval of an activity or bank holding company charter.

One, in the case involving the Sheikh, would the Sheikh have had to agree to the type of waivers you are recommending as a result of purchasing an ownership interest in the CCAH bank holding company?

Mr. MATTINGLY. My view would be that if he had filed an application, that would have been an issue. I can't speak for the Board, but I certainly think that the Federal Reserve would have seriously considered requiring a waiver. He did not, of course, file an application to acquire the stock with us.

The CHAIRMAN. OK. Does the Federal Reserve currently have adequate authority to require a waiver of a head of State and plug this loophole on its own?

Mr. MATTINGLY. We can require a waiver or deny the application. In my view, there would be legal authority to do that, yes, sir.

The CHAIRMAN. You do have that authority.

Mr. MATTINGLY. I believe we have that authority.

The CHAIRMAN. So we would welcome, at least I certainly would, and I solicited it before, any recommendation you might have of needed legislative action so that we can put that as sort of the head of the agenda.

I am curious to note what kind of an impediment or obstacle is given the Fed in denying access to documentation? What is their argument? What do they refuse? What basis?

Mr. MATTINGLY. You mean the foreign countries that have these bank secrecy laws?

The CHAIRMAN. Well, in this particular case, for instance.

Mr. MATTINGLY. In this particular case we, the Justice Department, and the New York County district attorney are actively discussing with Abu Dhabi getting access to those witnesses so there hasn't been a refusal. We just haven't been able to get the agreement necessary to do that.

I believe the argument that has been put forth is that they have their own criminal prosecution of these witnesses in Abu Dhabi and we have to work through channels in order to be able to get access to the materials.

The CHAIRMAN. I want to thank you very much. As I stated, when you first appeared on this issue when we had the hearings originally, we got the compliment of the Fed. At least we didn't experience what Great Britain did, and you don't have a whole passel of either shareholders or investors out there still not being able to get their money.

And I pointed out that one reason, because I have always, all through the years have pointed out how Great Britain had not had

one major bank failure in 100 years. This is the first, BCCI, and all during the Depression when we had a bank holiday, they didn't have it in Canada or Great Britain. Why? You know, there are reasons, and I have been trying to peruse those reasons all the 32 years that I have been on this committee and before. So I want to remind you that the reason it became possible was because of Maggie Thatcher's deregulation, and I just wanted to make that observation to stress why sometimes it becomes necessary as a matter of public policy to have that cop at the corner.

Mr. Leach.

Mr. LEACH. The chairman has made a very cogent observation at the end. I would only add that I think it is interesting that we are better protected than some other governments, partly because the Federal Reserve Board is independent and not tied to the executive branch. The executive branch has many concerns that relate to foreign policy as well as domestic politics that the Federal Reserve Board of the United States can sometimes be above. The situation is not perfect for our government by any means, and there are some awkward dimensions for the Fed, too, but I think it is better in this circumstance than it otherwise might have been.

Mr. Mattingly, it is my understanding that the Foreign Sovereign Immunities Act stipulates that when a foreign sovereign operates in a commercial way in the United States of America, he comes under all commercial law of the United States of America; is that correct?

Mr. MATTINGLY. That is what the statute says, yes, sir.

Mr. LEACH. Fair enough. If a foreign government owned a bank in this country, that government could be sued potentially by the Federal Reserve and not have sovereign immunity, is that correct?

Mr. MATTINGLY. That is the position that the Federal Reserve would take.

Mr. LEACH. Shouldn't this rationale apply to the Sheikh as well?

Mr. MATTINGLY. That is the question that is before the State Department and the courts right now.

Mr. LEACH. I see. Fair enough.

Mr. MATTINGLY. The Foreign Sovereign Immunities Act applies to foreign government agencies. It doesn't technically say the individual head of State.

Mr. LEACH. We have another action that you commented upon in your testimony, your full written testimony, and that relates to a civil action against Ghaith Pharaon for \$37 million.

Mr. MATTINGLY. Right.

Mr. LEACH. Is there a reason why he has not been extradited to the United States?

Mr. MATTINGLY. We have a civil charge and the Justice Department and the New York County attorney have criminal actions. I believe—I am not sure whether they have attempted to extradite him. I will try to find out and supply that for the record. But we don't have any ability to do that.

[The following information was subsequently received:]

Mr. Mattingly said the Department of Justice and New York County attorney sought criminal action against Gaih Pharaon, and Mr. Mattingly said he'd try to get more information on this.

Mr. LEACH. What are your staff recommendations to the executive branch related to the Sheikh?

Mr. MATTINGLY. Our recommendations are that if they go ahead and grant the immunity, that would appear to foreclose the ability of the Federal Reserve to take enforcement action if its investigation shows that there is a problem with the head of State. And again, going forward to the future, if that is the case, then that is going to be a matter that we will have to seriously consider if a head of State desires to acquire stock in a U.S. bank.

Mr. LEACH. Will the executive branch—and I assume it is a State Department judgment, as a practical matter—receive more or less money than the U.S. Government depending on the decision that is made?

Mr. MATTINGLY. Out of the BCCI?

Mr. LEACH. Out of the BCCI circumstance.

Mr. MATTINGLY. Well, if immunity is not granted, then the lawsuit could continue that the Board of Directors has brought against the Sheikh. If they win, if they are able to prove, then there will be damages paid to First American, and those damages would then increase the pot of funds that is available for forfeiture to the United States. So the answer to your question is, I believe, yes.

Mr. LEACH. Fair enough. Thank you very much.

Mr. MATTINGLY. Potentially.

The CHAIRMAN. Thank you very much.

Mr. Frank, did you have an opening statement you wish to place in the record?

Mr. FRANK. No, thank you, Mr. Chairman. I will just ask my own questions.

The question is very relevant to me in particular in my subcommittee chairmanship role because the subcommittee that I chair on International Development, Trade and Financial Services just sent along to the full committee legislation dealing with the conditions under which foreign banks would get national treatment in the United States, and I would think this is another aspect of this.

Mr. Mattingly talked about what happens if a head of State buys into an American bank, but we have a situation where foreign banks are allowed to operate here, and the Treasury Department just asked us to pass legislation, which we have begun, which makes reciprocity the ground on which we would allow national treatment for foreign banks.

Now, I would assume, Mr. Mattingly, and I am aware that the Federal Reserve position on this was not supportive, but assuming that we do this—and by the way, let me say, if we don't pass the legislation, then there is even more involvement by foreign banks. That is, the premise of the legislation is that we should restrict some foreign banks from getting national treatment here if they don't allow national treatment in their home countries, but in any case we clearly have this situation where there are foreign banks operating here. We expect that to continue. That is a subject of negotiations of the GATT.

Am I correct that if we take the position that the Sheikh gets sovereign immunity here, any foreign bank that was owned wholly

or substantially by a foreign head of State would have the right to operate here but with a substantial immunity to regulations?

Mr. MATTINGLY. Well, no, I don't think that that is quite accurate. The foreign bank itself, that would operate in the United States.

Mr. FRANK. Would be regulated?

Mr. MATTINGLY. Would be regulated, cease and desist penalties, all of that. That is the Foreign Sovereign Immunities Act.

Mr. FRANK. Right.

Mr. MATTINGLY. Now, if you had a foreign—

Mr. FRANK. Suppose the foreign head of State, the Sheikh—one of the things we have, I think there is a public difference since we passed—I remember when the Foreign Sovereign Immunities Act was passed, but there are a lot more countries there than there used to be of a much wider variety. There are smaller countries.

I think this is the problem. I think when they passed the Foreign Sovereign Immunities Act, they had a somewhat different conception of countries involved. Now, let's talk about those banks that are operating here where they are owned by a foreign head of State.

Mr. MATTINGLY. You are accurate. If you grant absolute immunity to the head of State and the—

Mr. FRANK. And members of his family or her family.

Mr. MATTINGLY. Right. And they own a foreign bank that has operations in the United States, then the Federal Reserve could not take enforcement action against them for illegal activity in connection with a bank in the United States. That is, if Sheikh Zayed's argument is correct that the immunity is absolute—

Mr. FRANK. That is the problem. As you say, you can regulate the bank, but part of our scheme of regulation, and it is something that this committee worked on, is the notion of deterrence. Now, in the civil area, not criminal, but fines and other things are part of deterrence.

In other words, for a regulator to have only the power to say "stop doing these bad things," most of us don't think that is sufficient because then from the standpoint of a rogue bank, what is the harm in trying something bad? If the only penalty for doing something wrong is to be told that you can't continue to do something wrong and perhaps have to disgorge some of the profits you made in this situation, on the other hand, even that would be a problem because if those profits that the bank had made by doing things that you told them to cease and desist from doing had in fact been sent back to the owner, foreign head of State, then those profits wouldn't be reachable, is that correct?

Mr. MATTINGLY. That is correct. You couldn't reach the head of State.

Mr. FRANK. So that you could have a situation where a foreign head of State would be running a bank in the United States. The legislation I was given contemplates a great expansion of foreign—or a significant expansion of foreign bank operations in the United States reciprocally. We are trying to get American banks to be able to operate overseas.

Part of the GATT is to have that expansion. You would have a situation where foreign banks owned by foreign heads of State

would be subject to a regulation in the sense that you could tell them cease and desist, and so forth, but you would, in effect, not be able to penalize any violations, and to the extent that this bank may have shipped profits back to the owner, you couldn't reach them.

Mr. MATTINGLY. Well, again, we would have full authority in our view over the bank, but we wouldn't have—

Mr. FRANK. Not over the owner of the bank?

Mr. MATTINGLY. Not over the owner, no.

Mr. FRANK. And if the officials of the bank told you that the boss made them do it and they did these on order, plus it seems you would have another problem, if the foreign owner, if you have absolute immunity, is there some privilege that extends? If I am working for a bank owned by a sovereign who has complete immunity, can you compel me to testify in ways that might implicate that foreign owner?

Mr. MATTINGLY. I certainly hope so.

Mr. FRANK. But I would assume we would get that defense as well. But the immunity, I would think it is a logical argument that you would say you are asking me to incriminate or to impinge there. But at any rate, the owner himself would be exempt.

I think that is a further problem with this, because my sense is if, in fact, people were to hold that the foreign owners were immune if they were heads of State, that we would then have to look at some kind of legislative approach that says that therefore we wouldn't want to waive the sovereign immunity as a condition for allowing them to operate here because I can't imagine us wanting to do this.

I say that, Mr. Chairman, because when we come back, I assume we will be taking up in full committee the legislation that my subcommittee reported out that was unanimous. The ranking minority Member, Mr. Bereuter supported it. We had talked to Mr. Leach about it. I think depending upon the position that is taken, we are going to have to address that because I think we would be opening ourselves up justifiably to criticism if we were talking about this—what our laws would be with regard to foreign banks operating in the United States if it were the case that several of them might well be owned by people who themselves would be immune from any operations we took.

The CHAIRMAN. Well, yes. That is one of our listed pending matters the moment we get back, to continue the actions and recommendations of your subcommittee. Let me add that we are not trying to usurp the jurisdiction of your subcommittee.

Mr. FRANK. I appreciate that, Mr. Chairman.

The CHAIRMAN. No. I just wanted to hasten to assure you that I am a respecter of the subcommittee system, and in fact I try to have the chairman of the subcommittees as autonomous as it is possible. But you have been such a constructive, creative worker, and the products of your efforts just during this first session as chairman of this subcommittee speak for themselves. But I also wanted to tell you that ordinarily if time weren't on us, I would have preferred to have gone through the subcommittee route on this matter.

Mr. FRANK. Let me say, there is also a shared jurisdiction here. I am not making any jurisdictional claim because we share this obviously, and in this instance, I think we come second to the Subcommittee on Financial Institutions. I think ownership of the bank has something to do with it. If it is—where the bank is chartered. But if it is an American bank, it is not within our jurisdiction. We get into it only so far as trade negotiations and only insofar as there is reciprocity.

I just noted insofar as to say that it is clear to me that the Treasury Department assumes that we are likely to see an increase in activities in the United States by foreign-owned banks, and it is in that context that I just wanted to point out that I think this takes on a—this is not just a unique situation. We are likely to see more of them.

The CHAIRMAN. Thank you very much, Mr. Frank.

Mr. Roth.

I don't have any further questions. We will, of course, be in communication with you, and expect to hear from you if you have some recommendations between now and January.

Mr. MATTINGLY. We will do that, sir. Thank you.

The CHAIRMAN. Thank you again, Mr. Mattingly.

Our second panel consists of the legal representatives of the Emir, Mr. W. Caffey Norman III, of the Patton, Boggs & Blow law firm.

Senator Charles Mathias, a long-time friend ever since he was a Member of the House, and who is presently the chairman of the board of First American, as I understand it, was trying to reorder his schedule to be here and may not.

Mr. Harry Albright, Jr., who is a trustee, referred to by Mr. Mattingly, of the First American Corp., and who has, as Mr. Mattingly well said, done an outstanding job as the trustee appointed.

And Mr. Joseph Dellapenna, professor of law at Villanova University School of Law.

And Mr. Adel Elias, the BCCI Depositors Protection Association. We will recognize Mr. Albright first.

Senator, thank you very much. Delighted you could rearrange your schedule and be with us, and it is a good sight to see you.

Mr. MATHIAS. Thank you, Mr. Chairman.

The CHAIRMAN. I remember, I am not going to say how many years ago; we were both a little bit younger, but we used to visit each other in the gym, and it is a real pleasure to have you this morning. So if there is no objection and, Senator, you have no time problems, we will recognize Mr. Albright first.

#### **STATEMENT OF HARRY W. ALBRIGHT, JR., TRUSTEE OF FIRST AMERICAN CORP.**

Mr. ALBRIGHT. Thank you, Mr. Chairman, members of the committee. I have a full statement I would like to file and then hopefully to—

The CHAIRMAN. Let me say that all of the statements that were submitted to us will be in the record exactly as you gave them to us. If it is possible to summarize, or you have a very short statement, you can use your judgment as to how you want to proceed.

Mr. ALBRIGHT. I will try to summarize, but it is somewhat difficult not to cover some of the points, so I will exercise my best judgment as you offered, sir.

About 1½ years ago, on June 23, 1992, I became trustee of First American Corp., by the order of Judge Joyce Hens Green of the U.S. District Court for the District of Columbia, at the request of the Board of Governors of the Federal Reserve, the Department of Justice, the district attorney of New York county, and the BCCI liquidators. A principal purpose of the court order was to sever the illegal ownership by BCCI of First American Bank by a forced sale of its assets, hopefully within the year, principally its wholly owned banks. And this sale was to be accomplished by me as sole trustee with exclusive control over all of the shares of First American Corp.

I should note that I did come to this position with some banking background.

Before I respond to the specific questions of the committee, however, I would like to publicly express my appreciation to you, Mr. Chairman, for your extraordinary and forthright response to my original letter of November 17. In that letter, as you know, I informed you of the request of Sheikh Zayed and his family that the U.S. Department of State suggest to the District Court the grant of a complete head of State immunity from the jurisdiction of the court. And in that connection, when those grants are entertained or sent by the State Department in that particular area, they are normally accepted with total finality by the courts, so it is of grave significance.

But in this connection, Mr. Chairman, contemporaneously with your support letter to the State Department, and that of Senator Kerry, the First American representatives and I met with the legal advisor to the Department of State, Conrad Harper, and we received a friendly and mutually informative hearing on November 18, from our side, at least. And based on that meeting I have some cause for hope that the precedent of a grant of immunity under these circumstances is more fully appreciated there, but obviously there is no assurance that our views will, in fact, be adopted by the State Department.

Now, on a personal note, as a former regulator—and banker, I have observed with considerable admiration your leadership in the Congress in warning of the potential adverse influences on the integrity of our financial and banking system of foreign entities operating beyond the laws and reasonable regulatory oversight. I can remember watching some of those in hearings when you were the only one in the room. No one is better aware than you or this committee of the effect of events here and abroad on an independent banking system which is now much more exciting because it has instant electronic transfer of funds.

Almost 20 years ago when I served as superintendent of banks in New York, we had the first collapse of a major bank in the United States since the major Depression, Herstatt, as you may recall, Mr. Chairman, and then the Franklin National. Ultimately, that national bank was taken over by a New York State-chartered bank. The Franklin was about a \$6 or \$7 billion bank. The Federal Reserve Chairman at the time said, "It is not insolvent." It unwound for about 2 or 3 months or so.

And the point that I want to make this morning, Mr. Chairman, supporting your efforts, is that the 4 months unwinding before the demise of the Franklin National would have taken place in an instant today. Most of those funds are uninsured, not like a thrift, and they all would have gone right out, as they almost did in the collapse of the Continental.

Thus, as a former bank regulator and a banker, I fervently support you and your committee's efforts here and abroad to improve the quality of analysis, regulation, and administration that can lead to a renewed confidence in an independent international banking system, and I particularly would deplore any possibility of a coverup of what really occurred in BCCI's control of First American.

I am sure, and you have heard it this morning, there were persons who would proclaim a high state of fatigue, announce a malaise, whatever, and wish that this whole matter would go away. There continues to be promoted the view that the United States no longer has a stake in pursuing this matter. But for our own national public interest, nothing in my opinion could be more wrong or further from the point.

The manipulation of information available about what really happened in BCCI's takeover of First American has allowed a number of myths to flourish about BCCI that need to be dispelled.

First, there is the myth that no one in the United States of America has been injured, no one has lost a penny as a result of the BCCI collapse.

Second myth: That BCCI's illegal ownership and influence over the management of First American caused no injury to anyone.

Third, that First American was brought to the brink of failure principally because it had bad real estate and commercial loans.

And finally, that Sheikh Zayed was duped and a victim along with everyone else, and has no civil liability. These myths are simply not supported by the facts.

First American was severely damaged by the BCCI scandal and its value was hugely impaired. A total of \$1 billion of deposits flew out of the First American Banks in 1991, principally as a result of the loss of confidence in the bank due the announcements of its illegal ownership by BCCI, together with the fact that First American was saddled with money-draining operations in Georgia and New York as a result of BCCI's control.

Two, where better than in Washington, DC can we argue? Approximately 1,500 First American employees, most of whom were living in this community, lost their jobs.

Three, the FDIC itself claims it incurred a \$100 million loss when it had to pay off holders of deposits in the Independence Bank in California.

Four, millions of dollars of expenses and untold administrative burdens have been imposed on Federal and State regulatory agencies and enforcement officials.

Finally, Sheikh Zayed and others were not duped but were knowing participants. They were not victims of the scandal, but in my opinion and that of the board of First American, were clearly perpetrators.

And the American public has a right to know those facts, and the true facts will deter future threats to the safety and soundness of the banking system.

Now, with those general observations, going to the answers to the questions you presented, what makes the BCCI matter so difficult to comprehend and frustrating to the public is that given the nature of the BCCI affair, the very process of investigation is so complex, time-consuming, and costly, and the explanations derived are so complex, that it becomes a matter of high cost and fatigue.

But the BCCI investigation, and you asked this of Mr. Mattingly, has certainly not been made easier by the fact that Sheikh Zayed's agents packed a 747 plane with most of the critical files from the BCCI London office, took them to Abu Dhabi, where they remained inaccessible despite the discussions that had been going on with the Federal Reserve and the others, and remain inaccessible to the trustee, to the bank, and to the regulators, and, importantly, to U.S. law enforcement authorities, including the Federal Reserve.

Nor has it been helped by the fact that Abu Dhabi detained in the United Arab Emirates 18 of BCCI's top managers without charges for 2 years and has refused to permit access to them by United States law enforcement authorities. It may be no coincidence that the criminal charges against 10 of these detained BCCI employees were filed only 3 weeks after First American alleged in the civil action that the Abu Dhabi defendants were obstructing justice, although it is not clear whether this government detention of former BCCI employees was originally involuntary or simply a collusive effort to avoid law enforcement. If it was involuntary, this lengthy detention without charges not only interfered with U.S. law enforcement, but clearly violated the basic human rights of the individuals detained.

Yet, while withholding from scrutiny these critical documents and witnesses necessary for me to perform my duties under the order of the court, Sheikh Zayed made application to the District Court within the next day after the announcement of the sale seeking immediate repayment of \$270 million in debts. While this application was denominated an attempt to clarify the court's previous order appointing me as the trustee, the fact is the Sheikh sought affirmative relief in the Federal District Court, relief in our court system.

It simply beggars the imagination, that the Sheikh, who possibly violated basic human rights, and arbitrarily rejects the legal and regulatory authority of the United States, has the temerity to seek a remedy from the very Federal Court he now attempts to deny jurisdiction through the device of head of State immunity.

I will pass by the background of my appointment, a process which you asked for. It is part of the record, and move to the issue of the civil action against Sheikh Zayed and others brought by the board of directors.

I supported this important civil action brought by the First American Corp., which seeks to remedy the damage done to these corporations by those involved with BCCI's illegal acquisition and control of First American. It is that civil action, as Mr. Mattingly pointed out, that has given rise to the events precipitating this hearing.

The lawsuit is of great importance to the liquidation of First American. At least \$500 million in damages, and probably substantially more, conservatively estimated by the board, were suffered by First American as a result of its illegal acquisition and manipulation by BCCI and the defendants. Trebled, these damages will amount to more than \$1,500,000,000.

In response to your and Mr. Leach's question, were this suit to be successful, at least 50 percent of the proceeds of that would go under the order of forfeiture to the United States Government, and the other half would go to the BCCI victims in Europe, Great Britain principally, the U.K. generally, Luxembourg, and Gibraltar.

But this lawsuit also serves, in my opinion at least, a very important additional purpose in the public interest. It assures that, through discovery, the truth as to the participants in the BCCI scandal will be in fact brought to light in a court of American jurisdiction.

Turning now to Seikh Zayed's efforts to obtain immunity through the State Department: Rather than answer First American's claims on the merits, defendants have attempted to avoid adjudication on the merits by applying to the State Department for immunity. A long time ago, even before our lawsuit, before it was brought, as far back as May, they were asking the State Department for a grant of sovereign immunity and head of State immunity, but this is only the latest of a consistent pattern of efforts by the Abu Dhabi to prevent investigation of their role.

As I mentioned before, they have taken all of the files from Great Britain in a plane and moved them to Abu Dhabi. There is no conceivable reason, apart, of course, from possible political and diplomatic pressures on the U.S. Department of State for it to lend its support to the efforts of the Abu Dhabi defendants to obtain immunity and to avoid answering for their participation in BCCI's misconduct.

It is not dictated by existing precedent on head of State immunity, however nebulous some may argue that that doctrine may be. The legal aspects will be handled and discussed by those far more competent than I, so I will pass by those. I do comment upon them in my statement.

Finally, I find personally that the claim that illegal participation in regulated banking activity in the United States by a head of State is immune from the reach of U.S. law impossible to accept. The absolute immunity doctrine asserted by the Abu Dhabi defendants would preclude not only civil actions brought against them by financial institutions, but could also bar civil or criminal enforcement actions by the Fed and other government authorities. One point where I would just depart from my text—under the order of the court, I am required within the time the asset sales are concluded to determine the bona fides of the debts claimed by the Abu Dhabi defendants. They must be bona fide. It is almost, with interest, \$270 million.

Were I to find that the debts were legal and binding, I assure you, Mr. Chairman, within an instant, those funds would be transferred from the jurisdiction of the United States to Abu Dhabi, and they would never be seen again. And those funds, if they are held not to be bona fide debts, will go directly to the U.S. Government

and the victims. Yet, I can't get ahold of the existing facts and evidence, to get those documents—because they exist either in Great Britain under secrecy laws, or they are in some other place, where clearly Abu Dhabi has control over them—nor can the Attorney General, nor can the Justice Department, nor can the district attorney, so it is not a happy situation.

Last, just a little bit of color to Washington, DC and the First American Bank. Some of us, I remember, the existence of a Morris Plan Bank. First American's predecessor was the original Morris Plan Bank. What was it? It was a cross between a thrift for small savers, a consumer loan company, and a commercial bank, but it operated in various States and therefore, First American had a multi-State franchise, extremely valuable.

The successor to the Morris Plan Bank became Financial General Bankshares and then ultimately First American, and building on this foundation, it had a unique niche in the metropolitan Washington markets. One out of every three households in Washington, DC had an account in the First American Bank. They had First American branch money machines, in the airports, all over. It was very powerful.

One thousand five hundred employees have lost their jobs. At one time, First American had assets of \$12 billion. Until the disclosure of BCCI ownership, it operated profitably. Now, when still known as Financial General, BCCI, funded again largely by Sheikh Zayed, with his knowledge, sought to acquire as far back as 1978 this bank, and after protracted litigation, Financial General was successfully acquired by Middle Eastern investors, including Sheikh Zayed, represented then at that time by Messrs. Clark Clifford and Robert Altman.

Regulatory approval was granted, but it was opposed only by the Virginia commissioner, Sydney Bailey, but only after assurances were given that there would be a complete separation between the management of Financial General, now First American, and BCCI whose role would be limited to a financial adviser. We now know that those assurances were completely false, that First American was owned in substantial part by BCCI. In addition, First American was never informed that BCCI intended to use its New York-acquired space, extraordinarily expensive space, which we are still struggling to dispose of, because it was BCCI's design and plan that First American become part of BCCI.

So in conclusion, I believe that a grant of head of State immunity to Sheikh Zayed under these circumstances, would: First, significantly undercut my duties and abilities as the court-appointed trustee by substantially impairing or reducing the net proceeds available for forfeiture from the liquidation of First American's assets.

Second, it would enable wrongdoers to have access to our courts, suing me, demanding that they have their money instantly, while denying that very same access to the courts of which I serve as trustee in the United States through sovereign immunity.

Third, it would further a coverup and eliminate perhaps the last best chance that we have to finally reveal all the truth in the world's most notorious banking scandal, which you and your committee were so importantly leaders in bringing to justice.

And finally, it would establish a dangerous precedent to the safety and soundness of our banking system and other regulated businesses.

Thank you so much, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Albright.

[The prepared statement of Mr. Albright can be found in the appendix.]

The CHAIRMAN. Senator.

**STATEMENT OF CHARLES McC. MATHIAS, CHAIRMAN OF THE BOARD, FIRST AMERICAN BANKSHARES, INC.; ACCOMPANIED BY HERBERT HANSELL**

Mr. MATHIAS. Thank you, Mr. Chairman.

I appreciate very much your warm welcome this morning, and I am glad to be here. I appreciate the fact that the committee has taken this time to look into what I think is a serious situation.

As the chairman has indicated, I am here as chairman of the board of directors of First American Bankshares, and I would point out that several members of the board of directors are also here: Jack Beddow, Paul Adams, and John Doar. The board is, of course, vitally interested in this subject, and I think their presence here is further evidence of that fact.

As the chairman noted in his opening remarks, there is a judicial aspect to this case, and it is an important one. I think, Mr. Chairman, that I am just going to rely on your assurance that the written statements will be included in the record, but I would make a further request that two memoranda of law—one by Prof. Andreas Lowenfeld of New York University; and one by Jones, Day, which is counsel to First American Bankshares—may also be included with my statement as part of the record.

The CHAIRMAN. Without objection, it is so ordered, sir.

[The memoranda of law referred to by Mr. Mathias can be found in the appendix.]

Mr. MATHIAS. Then I will summarize as briefly as I can, Mr. Chairman.

The judicial claim which is pending is an action brought by the board of directors of First American Bankshares against the Emir of Abu Dhabi and his sons and certain other parties, and they raise serious charges of direct involvement by the Emir and his sons and associates in the illegal acquisition of First American by BCCI.

As the trustee has just testified, First American was greatly damaged, nearly failed, and that was as a result of this illegal acquisition and certain consequent business transactions.

The Emir has asked the U.S. District Court to dismiss him and his sons from First American's lawsuit on the grounds that as a head of State, he has absolute immunity from judicial and law enforcement authority. I am not going to restate the legal arguments that are set forth in the memoranda that I have just referred to, but it does seem to me that there are some broad legislative issues at stake here.

In fact, Mr. Chairman, I suppose you and I might have prevented this morning's meeting if back in 1976 we had had a crystal ball. As the chairman well remembers, at that time we were trying to take the subject of sovereign immunity, which was an arcane, dif-

ficult subject, and move it from this mysterious area in which it was situated into a rational position in the courts, where courts could deal with it in a responsible and comprehensive way. And had we gone just a little bit further than was gone in 1976, we would have, I think, accomplished that fully.

But we have before us this specific question of what about the head of State? It is instructive, I think, to look at some subjects other than banking and just imagine what could happen, because every modern nation has found it necessary to put certain activities under special supervision and regulation. I suggest pharmaceuticals, nuclear activities, as well as banking, just by way of illustration, not by way of limitation.

It is ludicrous to assume that if a foreign head of State comes in and buys a pharmaceutical factory, that the Food and Drug Administration is going to close its files on that factory and grant it total immunity. That isn't going to happen.

If a foreign head of State comes in and buys a nuclear plant, some nuclear activity, are we going to suggest that he has total immunity for that activity in the United States? I think he would be laughed out of court. Banking is an activity which has very serious consequences for the welfare of a nation. The dangers may be of a slightly different character than drugs or nuclear activity, but nonetheless, it is extremely serious and I think the same considerations should apply as far as banking regulation is concerned.

Now, there are some specific considerations as far as the circumstances of Abu Dhabi's entry into American banking are concerned. I would certainly think that the fact that the Emir of Dhabi was thoroughly educated on the subject of bank regulation ought to be taken into account in connection with this claim of immunity. The committee will remember that he was involved in the first attempt to acquire First American, which, as the trustee has just said, was then known as Financial General, and he had involved two of his own sons in that first attempt.

The attempt failed. The SEC brought an enforcement action, resulting in a consent decree against the Emir's son. Now, of course, if the theory presently advanced by the Emir had been advanced in the SEC enforcement action, that action could have been defeated by a successful assertion of immunity.

The initial attempt to achieve Financial General also involved an application to the Federal Reserve, and that was unsuccessful. But the result of all of this activity must have been the education of the applicant as to how the regulatory process worked. And when they came around later and made a successful application, that must have been done in light of the knowledge that they had acquired, and implies at least to me, that they had accepted the legal responsibility, which attends the acquisition of a U.S. financial institution. And if that was not the case, then the time to demand immunity was the time of application for the approval of the acquisition, and not now, a decade later.

I think it is interesting to speculate that if immunity had been demanded at the time of seeking Federal Reserve approval of the purchase, that it isn't very difficult to guess what would have been the result. The same considerations that would have been applicable then are applicable today.

The impact of granting sovereign immunity on BCCI, First American, and on banking generally is certainly a legitimate area for consideration by the committee. I am not going to repeat the trustee's statements on the subject of the evidence; it is being held under lock and key in Abu Dhabi, but it is being sought by government authorities in several countries. It hasn't been made available, although it has been suggested that it might some day be made available. But those suggestions are generally accompanied by conditions that guarantee that the Emir's continued monopoly of control of the evidence and the uses to which it may be put will be maintained.

Now, to recognize sovereign immunity under those circumstances is nothing less than condoning the suppression of evidence and the obstruction of justice. As the trustee has again suggested, there are certain witnesses who are being held; the circumstances under which they are being held are somewhat obscure. If they are there voluntarily, they may be sheltered, in which case it appears to be a suppression of evidence. But if they are involuntarily held, it could be a human rights violation if they are being denied due process.

I would like to end, Mr. Chairman, with the suggestion that there is another matter of even greater importance in the long run that is involved here. The very dismal history of BCCI has portrayed in very stark terms the cost to the global economic community of the absence of an adequate system of worldwide regulation of banks and other financial institutions, and this, Mr. Chairman, is truly an issue that is awaiting legislative initiative. To grant immunity to certain highly privileged bankers would only retard the development of international regulations and perpetuate the black hole into which BCCI has fallen.

Thank you.

The CHAIRMAN. Thank you, Senator.

[The prepared statement of Mr. Mathias can be found in the appendix.]

The CHAIRMAN. I stand corrected. I had introduced the member of the law firm representing the Emir as Mr. W. Caffey Norman III, but I stand corrected. The staff informs me it is Mr. Middleton Martin. That is correct, isn't it?

Mr. MARTIN. That is correct, Mr. Chairman. Thank you very much for the correction.

The CHAIRMAN. Well, we recognize you at this time.

#### **STATEMENT OF MIDDLETON A. MARTIN, PATTON, BOGGS & BLOW, REPRESENTING THE EMIR OF ABU DHABI**

Mr. MARTIN. Mr. Chairman, if I might, I would like to read a brief oral statement and then make myself available for questions at the end of it or following the conclusion of the panel's testimony.

The CHAIRMAN. Yes, sir. Thank you very much for that.

Mr. MARTIN. Mr. Chairman, members of the committee, my name, as you have now heard, is Middleton Martin of the law firm of Patton, Boggs & Blow. I am here today as a representative of His Highness, Sheikh Zayed bin Sultan Al Nahyan, who is the President of the United Arab Emirates, and certain members of his

family who are high-ranking government officials in their own right.

My appearance is voluntary and has been authorized by the President and his family to address the questions raised in your invitation.

Before I turn to the questions posed by the committee, let me say that the lawsuit filed by First American Bank is a striking example of the wisdom of the rule of immunity for heads of State. First American's complaint is an outrageous collection of lies and slander directed at a highly respected leader of a friendly foreign government.

Mr. Chairman, the facts of the matter are these: My clients, Sheikh Zayed, Sheikh Khalifa, and the Abu Dhabi Investment Authority, which I may refer to in response to questions as ADIA, each own minority interests in First American's parent company. They paid for these shares with real money, their own money. Their ownership was fully disclosed to the Federal Reserve Board, and I would in commenting just briefly on Mr. Mattingly's answer to one question, say that a bank holding company application was filed in 1981 with respect to my clients, and all information was fully disclosed.

At the beginning and throughout the following years, filings were made every year with respect to the accurate shareholding interests of my clients in First American. The genuine nature of these investments is one of the few undisputed facts which was accepted and used in various contexts by both the prosecution and the defense in the recent *Altman* trial. These holdings were for investment purposes only, and the record makes that clear.

My client's shareholdings were never used to exercise control or influence over First American. This was confirmed by the investigations of more than 50 Federal Reserve examiners, and it was confirmed by testimony of many senior executives of First American in the *Altman* trial.

In late 1990, when my clients learned that BCCI appeared to own most of the other shares of First American's parent through secret and improper arrangements, they instructed us, Patton, Boggs & Blow, as their counsel, to disclose this information to the Federal Reserve. We, myself and others here with me, traveled to Abu Dhabi on the eve of the Gulf war to review BCCI documents never before seen from the personal files of the former chief executive of that bank, Swaleh Naqvi, that shed light on these secret arrangements.

The information we learned and the documents themselves were provided to the Federal Reserve, and as Mr. Mattingly said in his testimony, are the evidentiary basis for the enforcement actions that have been brought in the United States against BCCI, its management, and the nominee shareholders.

Mr. Chairman, without these documents, the Federal Reserve could not have taken the prompt and forceful action which it did to protect the United States' banking system.

Soon after we initiated these cooperative efforts with the Federal Reserve, our clients learned that the First American Banks were in serious financial condition. And contrary to the testimony I have just heard from Mr. Albright, who was not there when I was sitting

with Mr. Bill Taylor of the Federal Reserve Board, we were told—that is in early 1991—that the First American Banks were in serious financial condition due to bad management, poor commercial lending practices, and overexposure in a depressed local real estate market. This was told to us by Mr. Taylor of the Federal Reserve and by Mr. Mattingly.

Indeed, our clients were told by the Federal Reserve that the First American Banks were in danger of collapse, if significant capital support was not provided.

First American management, represented principally by the gentleman to my left, Senator Mathias, an outside director with whom the Federal Reserve suggested we deal, repeatedly met with my clients both here and overseas to implore them to provide this financial support. Likewise, senior Federal Reserve officials, most notably Mr. Taylor, Director of Banking Supervision, told us that First American must have substantial financial infusions, and that our clients were the only legitimate shareholders that the Federal Reserve could look to to support the banks.

My clients responded to these appeals from Mr. Mathias and others in management, and to the senior officials at the Federal Reserve on 5 occasions in 1991 and 1992, and we contributed a total of \$190 million in that 18-month period to save First American from failure. The history of this is outlined in my written statement.

Once the banks' financial condition had stabilized, Federal Reserve officials asked our clients to work with them and with Mr. Mathias to attract new management to First American that would restore public confidence in the institution, and then to create a trust arrangement that would enable the sale of the banks. Our client's active engagement in this process led to the retention of responsible management and ultimately the appointment of the trustee.

Our clients subsequently voluntarily placed their shares in this trust and at the request of the Federal Reserve, solicited other shareholders to put their shares in the trust as 75 percent of the shareholders had to do.

As a result of our clients' actions on all of these fronts, prompt disclosure to the Federal Reserve Board of what we found about the situation that was going on, substantial capital infusion at their request and at Mr. Mathias' and other management request, working to get responsible management, Senator Mathias and Mr. Katzenbach, working to set up the trustee, Mr. Albright.

As a result of all of these actions, the First American Banks were sold rather than failed, and the trustee now reports, we are very grateful and delighted to say, that he is going to collect around half a billion dollars in connection with this sale.

As a result of our clients' actions, Senator Mathias and the other board members will not be facing a lawsuit from the Federal Deposit Insurance Corporation, alleging negligence in their responsibilities.

Finally, as a result of our client's actions, the U.S. taxpayers will not be called upon to bail out yet another failed financial institution.

Now, I would have to say that there were many people that worked responsibly and ably toward this goal—the trustee, Senator Mathias—but I do not wish my client's own substantial contribution to this process to be denigrated, and I am sure—I am glad Mr. Mathias is on this panel, because he can speak to it, and if Mr. Mattingly is still in the audience, I am happy he made some mention in his testimony, both of the substantial capital infusions as well as the confirmation that we were passive investors in this bank.

You have asked us specifically to address two questions today, Mr. Chairman. The first is the basis for our request for head of State immunity. In spite of everything that my clients have done to support First American and to enable the banks to be sold, First American has filed a lawsuit claiming \$1.5 billion in damages from my clients.

This suit is totally groundless. It is nothing more than an unconscionable attempt to avoid repaying a legitimate debt to my clients for their capital infusions over the last 2 years that saved the banks and saved the American taxpayer. One thing I want to make clear is that if the head of State immunity issue were not involved, if my clients were private citizens, there are any number of grounds on which this lawsuit would have to be dismissed.

First American and its trustee have not been injured. This was an institution bought by a group of Middle Eastern investors for \$200 million in 1982; it was sold for \$500 million. There have been no valid legal claims put forward.

A corporation cannot sue its shareholders. How did Sheikh Zayed, his son, and the Abu Dhabi Investment Authority, who provided over \$330 million in debt and equity to First American in the last 10 years, and have never received a penny in dividends or interest, possibly damage First American? It has now been sold for half a billion dollars. Why would they seek to harm an institution in which they have invested so much and worked so hard to support?

If any one has been injured, it is my clients and the Investment Authority.

There has been reference to the BCCI debacle. My clients lost billions of dollars in the BCCI debacle, and now they are being accused of helping to steal it. I frankly can conceive of no more absurd nor unfair an accusation.

My clients, as you know, have filed a motion in U.S. District Court to dismiss this lawsuit on all of the grounds that I briefly outlined above, only one of which is head of State immunity. We are willing to let the court make the decision on the legal merits of our case.

Another ground for our motion to dismiss, aside from these other ones, is the ground of head of State immunity. As our court papers and our written statement describe in detail, immunity from civil suits for sitting heads of State have been the rule of law followed by U.S. courts since the founding of this country. It is the general practice throughout the world.

We have found no precedent from any nation in the world for maintaining a civil action against a sitting head of State—and we can get into this in questions, if you wish—but there is a distinc-

tion between sovereign immunity of States as it arises under the Foreign Sovereign Immunities Act, and the question which arises under customary international law, but it has been accepted in our courts and by the State Department since the 1976 enactment of the Foreign Sovereign Immunity Act of the absolute immunity of the person of a sitting head of State.

I am happy to discuss that further in questions.

The legal basis for head of State immunity grounded in principles of comity and reciprocity among nations is set forth in detail in our written statement. The United States follows this rule of law in dealing with foreign sovereigns, and applies it to our own head of State.

The U.S. President cannot be a defendant in a civil lawsuit here. If you consider the implications of President Clinton being called away from his duties for weeks on end to defend himself in a civil lawsuit brought against him in a foreign country, where he may have made an investment years ago when he was a private citizen, the reasons underlying the soundness of this principle are obvious.

The question we were asked—another question is whether a grant of head of State immunity would set a bad precedent for the safety and soundness of the U.S. banking system. I think this is a valid and important policy question for your committee to deliberate on, Mr. Chairman. I am glad that you are. I think in this particular case it is difficult to imagine how any U.S. law would require minority shareholders in a U.S. bank to do more than my clients have done for First American.

In addition to acting responsibly to save First American from financial ruin, they went beyond any requirement U.S. law now imposes to volunteer to place their shares in trust, so that First American could be sold promptly. As a result of this action, we have Mr. Albright's appointment to which we assented and encouraged, and he has been able to sell First American assets for a half a billion dollars.

Astoundingly, he then refused to repay the debts that Senator Mathias and the Federal Reserve had solicited from us, and in doing so had represented to us would constitute valid binding and enforceable obligations of the corporation. The trustee's response to our request for repayment out of the sales proceeds was to interpret the trust order as giving him the powers of a special prosecutor.

When we asked the court which appointed the trustee to clarify the scope of his powers, he had First American file a lawsuit against us. My clients are understandably appalled and outraged by this development.

To respond another way to your question, the only bad precedent that could possibly be set would be to permit First American's lawsuit to proceed against Sheikh Zayed and his family. Failure to recognize their sovereign status would send a devastating message to friendly nations and their leaders around the world that your efforts to address matters of concern to the U.S. Government through cooperation and assistance as we have been doing will not be reciprocated and your sovereignty will not be respected.

Mr. Chairman, let me conclude by saying once again that head of State immunity is only one of a number of grounds on which this

ill-conceived case should be dismissed. It is not, as First American would have you believe, an attempt to block legitimate investigations into the BCCI affair which are ongoing in appropriate government-to-government channels.

Mr. Chairman, as the biggest victims of the BCCI frauds, my clients support and are cooperating with the investigatory efforts of law enforcement officials in the United States, including the Federal Reserve, the Office of the District Attorney of New York, and the Department of Justice, and are cooperating with foreign criminal authorities, like the Serious Fraud Office in Great Britain, and the Ministry of Justice in the United Arab Emirates.

The Government of the United Arab Emirates, as a friendly foreign government, has a very strong interest in assisting the United States Government's investigations into BCCI. All governments should work together to get to the bottom of the biggest bank scandal in world history, but the Government of the UAE also has a paramount interest in pursuing the BCCI criminals located in Abu Dhabi and elsewhere around the world, since Abu Dhabi was by far the largest victim of the BCCI frauds.

The UAE prosecutor has indicted a dozen of the bank's former officers and their trial has been ongoing for several months in the UAE. The United Kingdom's Serious Fraud Office has visited several times to Abu Dhabi and has received significant support for its investigations. We are moving forward on a number of fronts with relevant U.S. Government investigatory agencies and other governments around the world to conclude these investigations and bring wrongdoers to justice.

I would be happy to address further questions the committee has on this subject, and I would ask that my statement be included in the record.

The CHAIRMAN. Yes, sir. As I said before, all of the statements will be in the record.

[The prepared statement of Mr. Martin can be found in the appendix.]

The CHAIRMAN. Our next witness is Prof. Joseph Dellapenna.

#### **STATEMENT OF JOSEPH DELLA PENNA, PROFESSOR OF LAW, VILLANOVA UNIVERSITY SCHOOL OF LAW**

Mr. DELLA PENNA. Yes. In some respects I am the odd man out in this panel, because I am the only person at this table who does not have a professional interest in this litigation. Indeed, until a week ago, I was not aware that Sheikh Zayed had invoked a claim of head of State immunity. I learned that when a staff member of this committee called me and asked me if I would appear today.

In that regard, I would like to indicate that I probably will be amending the draft of my full testimony based on further thought, because it was put together rather hurriedly in the last few days.

I should also disclose that about a year ago, I did some work on behalf of the United Arab Emirates through a barrister in London, and that is the closest I have to any financial interest in this case—I have had no further dealings since January in that proceeding, and I don't expect to.

Now, in part because I am not directly involved in this litigation, I did not in my memorandum address the precise litigation that

has been the subject of this discussion, and I will not in my remarks this morning. I was asked to address somewhat more abstract questions about whether there is a head of State immunity doctrine and what its shape is and perhaps what its shape ought to be. And I will speak to those questions this morning.

I would state categorically that there really is no such thing as a head of State immunity doctrine. It is much more of a notion that heads of State ought to be immune than a legal doctrine. In fact, only by stretching rather considerably the import of a very few precedents from before 1976, can one even construct an argument that there is a head of State immunity doctrine, at least before 1976 when the Foreign Sovereign Immunity Act was enacted.

The purpose, as has already been indicated this morning, of enacting the Foreign Sovereign Immunity Act was to move claims of sovereign immunity out of the State Department and into the courts, a move, by the way, that originated in the State Department because it found itself subject to intense diplomatic pressure to manipulate its recommendations or suggestions of immunity for political ends, and sadly to say, on more than one occasion succumbed to those pressures.

It felt—the State Department at that time felt that by moving those decisions into the courts, it would in fact reduce its own embarrassment in the conduct of foreign relations, because no one could any further demand that the State Department intercede on its behalf.

Now, the State Department, despite that decision and despite Congress' response by enacting the Foreign Sovereign Immunity Act has, in a number of respects, sought to retain the power to intervene in proceedings through what is really a novel notion in terms of the law prior to 1976, that it could issue binding suggestions to courts on head of State immunity, even though it could no longer issue binding suggestions on foreign sovereign immunity. That is the origin of the notion; remarkably, most courts seem to have gone along with it.

If you examine the precedents that have arisen since 1976, you find virtually without exception that courts have deferred to the State Department's recommendation in this regard. Granting immunity when the State Department chooses not to suggest immunity, often in cases that would not be entitled to immunity under the Foreign Sovereign Immunity Act, and rare exception, not granting immunity in cases where the State Department declines to suggest immunity or issues a noncommittal response to a request for suggestion.

It doesn't take very much imagination to see that the State Department has manipulated these suggestions in frankly, one might say, a crassly political way. The doctrine that they claim exists under the title of head of State immunity has been extended by State Department suggestion to the wife of the President of Mexico, to the son of the Queen of England, Prince Charles, but denied to the daughter of President Ferdinand Marcos when he was no longer in political favor.

It was extended to Prime Minister Thatcher, who is, of course, not and never was head of State. It was extended to the Secretary of the Government of Mexico, which is an even lower position than

Prime Minister, on the grounds that he was entitled to head of State immunity, and courts have accepted those suggestions and, of course, denied to other lower officials again when the State Department did not feel that it was politically expedient to make a suggestion.

This is, of course, the very problem that the Foreign Sovereign Immunity Act was intended to prevent. The outcome of the current litigation might very well help to crystallize the notion of head of State immunity into a firm doctrine, depending on what the State Department does and what a court does in response.

Now, interestingly enough, the British State Immunity Act expressly defines a foreign State as including the head of the State, as well as the State as an abstract entity and various agencies and instrumentalities, even though it is called the State Immunity Act. Ours, which is called the Sovereign Immunity Act, does not mention the head of State.

Apropos of the comments that were made earlier today about the situation in the United Kingdom being much worse than in the United States as a result of BCCI, suggests that removing immunity would not preclude the sorts of problems that have arisen in this context, but nonetheless, the question arises, is there or should there be a separate legal doctrine of foreign head of State immunity?

My conclusion is, at best, it is an amorphous notion. On policy grounds, I would argue that it should not be separate from the Foreign Sovereign Immunity Act. The Foreign Sovereign Immunity Act has been extended by judicial interpretation to provide protection to government functionaries when they are acting on behalf of the State in a context in which the State itself would be immune.

I believe that that derivative of immunity is really all that a foreign head of State requires, with one twist, which is that it is perhaps appropriate to accord the head of State diplomatic immunity while in the United States, as well as the derivative sovereign immunity of the State.

Now diplomatic immunity means simply that they cannot be sued. It does not mean that they incur no liability. It means that they cannot be served with process while in the United States, but if you can obtain jurisdiction over them through some other fashion, than service of process while in the United States, you can subject them to suit on the same basis as you would any other person who has incurred a liability, as long as, again, they are acting in a nonofficial capacity.

I do discuss in some detail the cases that underlie these conclusions in my prepared testimony; I don't think it would be very fruitful for me to go through the details of those cases. But if anyone has questions, I would be glad to attempt to answer them.

But in summary, that is my basic conclusion of the legal question, that this really ought to be—head of State immunity ought to be seen as a derivative from the Foreign Sovereign Immunity Act, subject to the same standards, just as the courts have extended the derivative immunity, if you will, to other government officials under the Foreign Sovereign Immunity Act, just as the courts have applied the Foreign Sovereign Immunity Act to international orga-

nizations, which also are not mentioned expressly in that statute, and so on.

The simplest way to do that would simply be to amend the definition section of the Foreign Sovereign Immunity Act to add the head of State within the coverage of the statute as part of the foreign State, if you will, after the model of the British statute.

I do indicate that that would require some thought as to whether you treat the foreign head of State the same way as you treat the State itself, or whether you treat the foreign head of State as the agency of instrumentality is treated, because they are not treated in precisely the same way. But that is a choice that if you give some thought I think wouldn't be too difficult to make. But that would be the simplest way.

A more focused statute might be appropriate because in some respects—more than in some respects—in many respects, the Foreign Sovereign Immunity Act has proven difficult to apply in practice, and it might perhaps, particularly in terms of banking and other regulated industries, be desirable to have a more specific statute tailored to the precise needs of the regulated industries.

That is a separate question. I haven't attempted to draft such a statute. Although again I would suggest that the British statute in some respects would be a good model to look at.

Let me finally indicate that this problem arises from this notion, I should say, that there is immunity, personal immunity from the head of State, of course, which arises from the old confusion between the personal sovereign and the State, best captured in the statement of Louis XIV "l'état, c'est moi" ("I am the State"). That may well be the way Sheikh Zayed considers the matter, I don't know. But it is not the way we consider the matter, and I don't think it should form our law.

You did ask one particular question: What effect would a statute or a ruling by a court or even a decision by the State Department that there was no immunity in this case have on American commerce, and, of course, I have no empirical data that would prove it one way or another, but I would suggest, based on our own experience under the Foreign Sovereign Immunity Act, when we sharply curtailed the immunity of foreign States doing business in the United States—and indeed, the British experience, where their statute expressly removes the immunity of foreign heads of State when they are dealing in a private or commercial fashion—that it would probably have little or no effect on our commerce at least in terms of the foreign heads of State buying, selling, or investing in the United States.

The earlier statutes had little or no deterrent effect in terms of making the American market less attractive to foreign governments or in Britain to foreign heads of State. I see no reason to think that a clear statement that Sheikh Zayed is not immune in this case would have any greater effect.

On the other hand, recognizing immunity I think probably would not have a great deal of effect on American commerce either, for much the same reason. Sheikh Zayed, if he chooses to address the United States does so because he is attracted by whatever features the American market have attracted him. If an American chooses to deal with Sheikh Zayed, even knowing that the sheikh is im-

mune, that American entity or person does so because the sheikh has the money.

I mean that commerce is not likely to be greatly affected one way or another. What is affected is the bargaining balance between the parties. That is, if the sheikh is immune and the only effective way of avoiding that is to get the sheikh to agree to waive the immunity, the American party will have to give up something, pay something for that waiver.

Similarly, if the sheikh is not immune under our law, and he wants to structure the transaction in a way that optimizes the chances that he will turn out to be immune, he has to pay something to obtain agreement for that structuring. So it does affect American commerce in that sense; the terms of the transaction rather than whether the transaction takes place.

Finally, of course, it affects something else that has been at least alluded to this morning, and that is the question of achieving justice in a court, or for that matter, I mention it in my prepared remarks, achieving regulatory goals by regulatory agencies. If the sheikh is immune, he can—we have heard statements alleging that the lawsuit by First American Bankshares is a pack of lies and so on. I have no idea whether that is true or not but we will never know whether that is true or not, if a claim of immunity is upheld, because there will never be a trial, and that is, of course, precisely what I mean by saying the ends of justice will be frustrated by the recognition of claim of immunity, and that is not something to be taken lightly.

Similarly, there is at least a legitimate fear that regulatory goals will be frustrated if the sheikh is found to be immune, and I think the exchange of volleys earlier this morning between Congressman Frank and the representative of the Federal Reserve suggests that that is a real possibility.

So there are some genuine reasons why I would favor clearly indicating that—whether by statute or otherwise—that foreign heads of State are not immune when they act in a private or commercial fashion, although they do not pertain to simply the questions of the volume of commerce, or investment.

Thank you.

The CHAIRMAN. Thank you, Professor.

[The prepared statement of Mr. Dellapenna can be found in the appendix.]

The CHAIRMAN. Mr. Elias, did I pronounce it correctly?

Mr. ELIAS. Yes.

The CHAIRMAN. I have the tendency, you know, I had to learn English, and my mother tongue is really Spanish, so I would have pronounced it Elias, but I have to check myself.

Like Mr. Dellapenna, the two Ns makes it very different from the Spanish. So we want to thank you, Mr. Elias, for being here this morning, and in your representative capacity of the association.

#### **STATEMENT OF ADEL ELIAS, BCCI DEPOSITORS PROTECTION ASSOCIATION**

Mr. ELIAS. Thank you, Mr. Chairman.

Mr. Chairman, and members of this committee, on behalf of the victims of this saga, I express my thanks for the opportunity to

speak to you at this meeting. I have to say that sometimes I am very emotional after what happens to us in this. I would like to ask that my written statement, which has already been submitted to the committee, be part of these proceedings.

The CHAIRMAN. Yes, sir. It is.

Mr. ELIAS. Thank you.

With that, let me simply state the following facts. The details of the horror stories of the victims of BCCI who have lost billions of dollars because of the fraud, has been part of the record of many proceedings, including this and elsewhere. I don't intend to go and rehash many of the stories of people, including me, who lost their life savings and most of their personal fortunes because of the reliance on the Abu Dhabi committee to support BCCI at a time when BCCI was beyond financial redemption.

I am one of those people who continued to bank with BCCI after we had heard so many things about it, only after we received confirmation that the bank has a hold now that Abu Dhabi is behind the bank.

The urgent issue is that Abu Dhabi is seeking to avoid any liability for their participation in the BCCI fraud by claiming that its ruler and those working with him are entitled to head of State immunity. I am advised that there is a possibility that the U.S. Government would suggest to a Federal Court of the United States that Abu Dhabi, defendant in the First American Bank litigation, are immune under principles of head of State immunity. I am further advised that such determination may be binding on the court.

It will be a disaster to our efforts to recover our losses from Abu Dhabi not only in the United States, but elsewhere in the world. The Depositor Protection Association, which was formed on July 6, 1991, from people around the world who lost billions of dollars, over \$1 billion of deposits, are members of our association, feels that such holding would be submitted to courts for reason of international comity on recognition of the enormous influence the United States might give, might give recognition to the authority of such decision and thereby impeding our efforts to recover our losses from Abu Dhabi.

I am sure all of you are aware of the efforts of the Depositor Protection Association and what happens worldwide in the courts of England and in the courts of Luxembourg and how successful we were to stop the contribution agreement from going forward.

This then is a plea to the U.S. Government, not only to suggest immunity for the Abu Dhabi defendants in the First American litigation, but rather to recognize that the conduct of those defendants was, as alleged in the First American complaint, personal, private, nongovernmental, and purely financial and therefore entitled to no immunity before the law. There is no one above the law.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Elias can be found in the appendix.]

The CHAIRMAN. Thank you, Dr. Elias.

Professor, I think you are right—you are a distinguished professor at law at a very distinguished law school—on the question of justice, but what I have said to the staff, the question again and what I have seen here so many times and in the other capacities

I have served, again in a legislative capacity, 5 years on the State Senate, starting out 3 years on the city council, is that the justice system is of such a bend that if you have the resources, as you well know, you can get the talents that are required, you might do well in a court of justice or so-called justice; but if you are somebody that can't get those resources, you are going to get stuck. And it reminds me of the very old English saying that the law jails a man or woman who steals a goose from the common, but turns the greater felon lose who steals the common from the goose. And this is exactly what we see here time and time again.

For the 32 years I have been here, I have been struggling to get some definitive legislation in such things as community development, housing, which is a real crisis in our country. Maybe it isn't perceived that way right now, but when it does, it will be another one. And yet when we get the powerful interests that want to push legislation not so much since those scandals in 1988, not as much and not as bluntly and crudely, but certainly before that, one involving billions goes right through, no problem whatsoever.

So in this case, I think Dr. Elias is right, and that is that whether through a noxious improper interpretation of a law, a system is erected whereby certain persons will be privileged and immune, I think is bad.

Now, Mr. Albright, you evoke memories, and I recall you well and your distinguished service as a regulator in New York. When you mentioned the first—the forerunners, the handwriting on the wall was clear in the 1972 Franklin—originally Franklin Square Bank, then the Franklin National, had every bit of the ingredients of what has turned out to be on the grander scale the big problem. As you will remember, it was the ejection of the person who built that bank, Roth, from the board.

Mr. ALBRIGHT. Correct, a very active housing proponent in Long Island.

The CHAIRMAN. Absolutely. He was the one that made the greatest use of FHA by a commercial bank and nobody else.

Mr. ALBRIGHT. Built the island itself.

The CHAIRMAN. But when he went out and you brought the foreign, Roberto Calvi—I believe it was Salcri.

Mr. ALBRIGHT. Sindona.

The CHAIRMAN. I mean Sindona. Sindona was connected with Robert Bacalli.

Mr. ALBRIGHT. You are right, Mr. Chairman.

The CHAIRMAN. And the schemes that were used to evade the regulators, the OCC, and even the Fed, were clearly the first revealing pattern.

Mr. ALBRIGHT. Yes, indeed.

The CHAIRMAN. Now, I was lower on the totem pole and we had just gotten a new chairman, Mr. Royce, and I approached him and asked him what, if anything, was going to be done; that is, later. In 1972, Chairman Patman was still the chairman, but if you will recall, it wasn't until 1974 that you had the actual demise and all of the after splashing and whatnot, and Mr. Patman called a meeting of the committee and had the Comptroller of the Currency. I still have his testimony.

Now, I was never a member of the Subcommittee on Financial Institutions so I was just a witness, so to speak, or rather a presentation member or colleague, member of this committee, but I felt that it was very, very significant really and it showed a pattern emerging that together with the other developments in the 1960's and even going back to 1958 with the advent of the Bank Merger Act, and that was before I came to the Congress, but in the middle 1960's we had the enhancement of the Bank Merger Act and the one bank holding company, if you will remember.

Mr. ALBRIGHT. I do indeed.

The CHAIRMAN. And I became very troubled and, in fact, so I became troublesome and bothersome, and the chairman, both Mr. Patman, who was a great guy, kind of just thought, well, you know, where are you coming from? So that then we had the 1984, 10 years after Franklin, the Continental Illinois.

Again, in the Franklin, though, if you will recall, the phony type of capitalization that was brought in by this foreign capital and the consequences thereof, and the fact that the supervisory and the regulatory—we had no law, no Federal law governing then, so that is why in 1975 I importuned the chairman then, later chairman of the full committee, Mr. St Germain, who at first refused to come to my hometown of San Antonio to have hearings because of information that had been brought to my attention of this fast and pretty substantial movement of money across the border at will and was beginning to come in and impacting our local institutions, small banks and S&Ls. And it was obvious that some of my constituents were going to get fleeced.

So finally, after I had become chairman of the Subcommittee on International Finance, which I held for 10 years, incidentally, so I then told the chairman of the full committee, Mr. Royce, that was his first year as full chairman, that if I couldn't get, well, then I was going to do it on my own as the Subcommittee on International Finance. Didn't want to do it because I felt that this was actually a—the prime jurisdiction of the Subcommittee on Financial Institutions and Regulation and Supervision.

So finally, Mr. St Germain said, all right, I will go. Brought him to San Antonio. We had hearings. As a result of those hearings, we had, again, the revelation of some of the principles, one particularly from Louisiana who later surfaced in the case of the S&L scandals in 1989, 1988 and, in fact, became subject to prosecution by the Federal Government. But what he prosecuted in 1988 was exactly the same thing that was being done in 1975.

To make a long story short, as a result of that hearing, you had two indictments, two convictions, but then I couldn't follow through and get my chairman of the subcommittee or chairman of the full committee to do anything about providing legislation. I said the only reason that we can justify having hearings or anything is toward some legislative purpose or end.

Now, we don't have a law that governs what now we call international banking. So it took 3 years and then I drafted one, but they thought it was too strong. And finally Chairman Royce said, well, tell you what, in 1978 we final drafted the first so-called International Banking Act, and then the amendments to that later on came in the way of cash transaction reporting and the like, but

actually that was the beginning of our Congress establishing policy with respect to international money movements and banking in our country.

So what I wanted to say was that by the time we got to 1976, Senator Mathias is absolutely correct, the impelling motive there was not banking on the Sovereign Immunities Act; it was over in Foreign Affairs. And I remember discussing with the chairman of Foreign Affairs, then Dr. Morgan of Pennsylvania, but there was really nothing but State Department-motivated international political reasons for that. So the rest is history.

We now are confronting a world, as you know, and I believe you made reference to it, where—and this is worldwide and it is going to take international effort, and it is an area in which the Congress really is quite limited. It is going to depend on the leadership exerted in the executive branch and in our central bank, and that is that we now have a huge, gigantic economy separate and apart from what we always have called a real economy or the money, the money economy. You now have this other economy, which I call the paper economy, in worldwide transactions involving \$14 trillion, and fractions of that moving worldwide in what is known today as a nanosecond.

Now, we are concerned about that and we have touched on it from the standpoint of derivatives by this committee and we intend to proceed, and Mr. Leach has been most helpful and has a very great grasp of this, even though it is very complicated, and we have a lot that we have to yet know and understand. But nevertheless, that does exist over there. It worries me because the real economy where you use the money as we understand money, the production of goods, the commercial interaction in the transaction of trade is really now a very minimal financial activity compared to this other.

Mr. ALBRIGHT. Could I just interrupt?

The CHAIRMAN. Absolutely.

Mr. ALBRIGHT. I find this absolutely fascinating, because those that I worked with were somewhat concerned about the relevance of some of my comments about the history, but I have to tell you that history teaches us a great deal.

You know, what is really fascinating to me and I am sure would be to Mr. Leach is that last week we had a public statement that better than 50 percent of the assets of the Nation's families and households are no longer in banks.

The CHAIRMAN. That is right.

Mr. ALBRIGHT. We now have perhaps the greatest mistake that Paul Volcker ever made as Chairman, and I admire him greatly, was when he failed to exact reserves upon money market funds so they could have some semblance of regulatory control. But if you take these two together, what I think is that Senator Mathias and you are really talking about is the need for worldwide regulation—

The CHAIRMAN. That is right.

Mr. ALBRIGHT. For comity, something along the lines of what we had with the Basel accord. But to move it to another dimension, we should also recognize that we are in a period of instant electronic funds transfer, with only half of our banking system being regulated from a practical standpoint—in the traditional sense. The

Fed has lost half of its jurisdiction over the money that is in the hands of American families: It is in money market funds, that is where it is now. I can transfer these money market funds for my family within a second. But if you go down to banks, you stand in a line; that is why the banks are losing.

The CHAIRMAN. On that, we have also prepared legislation to make sure that the banks' activities and emergence into the mutual money markets is done in such a way that the clients know full well that those are uninsured investments.

Now, coming back to the other, in this activity, if it were even related to a semblance of reality, of rationality, but the fact is that you have most of that activity in this fast money movement in the very speculative areas such as futures and futures in international currency, currencies, and other numerous—a plethora of derivative forms.

Now, if you are speculating, and if you forget the definition, derivative means that it is derived from something and it must be the base where you started out, and when you look at that and its value and what has ballooned up here—

Mr. ALBRIGHT. All off balance sheet.

The CHAIRMAN. Exactly. And as far as banks are concerned, my concern, which goes back a few years, is the off-balance-sheet activities of the principal banks of our country. The banks in our country, off balance activities, which include this kind of transaction and against which they don't have to have reserves, incidentally, as you know, has reached the point where in one case that activity is 1750 percent more than its capitalization structure.

Now, how in the world can that be rational banking accountability and prudent activity? If you are going to be a gambler, that is one thing. If you are going to be a banker, well, then, that is another.

But you are right. The other thing that is also tied in with all of this is that better than 60—it is estimated as high as 65 percent of our actual currency is outside of our country. It is not in this country. It is outside.

We also have been charged with knowledge for now 2 years in this report we received from the Fed that in the case of the \$100 bill, the extent of—the ease with which it could be counterfeited overseas, somewhere in a Middle Eastern country is what we were first told, had endangered the position or the value or the validity because it was in such—it was being counterfeited in such volume that in Europe it would begin to raise suspicion as to the quality, the validity, and the integrity of that currency, at least the \$100 bill.

We came up and suggested, and this was the year before last, the only thing we could do would be what the British have done to avoid that. They change their designs on their paper money every 5 years, but we won't. And I could not convince the Secretary of the Treasury to even become interested in having some kind of an enhancement in the material, even the ink used and whatnot. So anyway, we are still exposed.

Now, all of that dovetails because in the meanwhile, with the speculation in the international currency markets, the value of the dollar on a sustained basis—this is what is so dangerous—in fact,

to me it is the most crucial, critical issue that I can't get any interest on—the value of the dollar with respect to the yen and the deutschmark has lost two-thirds of its value. That is just in a matter since—mostly since 1985, 1986.

Mr. ALBRIGHT. Sometimes by deliberate policy.

The CHAIRMAN. Well, it would become if you start speculating in this—

Mr. ALBRIGHT. I meant that sometimes by deliberate political policy to make us more competitive, but it is the true value of our worth in the world and we are kidding ourselves if we think it just provides us a temporary advantage in trading.

The CHAIRMAN. Well, but the danger as I see it is that contemporaneously, we have piled up a huge governmental debt, a huge corporate debt structure, and a huge personal debt structure.

Now, we are the only country that has ever been privileged to pay its debts in its own currency. No other country has. We are the only ones. This used to anger General De Gaulle, who called it the dastardly American arrogant privilege.

Mr. ALBRIGHT. The exorbitant privilege, I am counseled, it was called.

The CHAIRMAN. Thank you very much.

Mr. ALBRIGHT. Expert witnesses.

The CHAIRMAN. All right. Now, if the value of the currency of a nation on a sustained basis is losing, is lost and continues that losing trend, the danger as I see it is that the dollar could be supplanted as the international currency reserve unit.

Now, when I say that I am looked at on, what are you talking about, well, what it means to me is the worst possible thing because it means if that happens, and to a certain extent it has already, a lot of the transactions are now marked in ECUs in Europe, not dollars, but if that happens, then all of this debt will have to be paid back in somebody else's currency. That is the point I have been trying to make. But apparently it sounds a little outlandish.

Now, it has everything to do with even this relatively minor issue compared to this, what I consider to be the most critical, clear, and present danger to the continued independence and sufficiency of our economic and financial liberty in our country. I don't know of any nation in history that has been able to sustain the loss of the value of its currency to the point of debauchery where it hasn't suffered very grave consequences anyway.

So enough for that. It seems to be off point, but it isn't.

Mr. ALBRIGHT. No, it is not.

The CHAIRMAN. Now, the only point I wanted to make with respect to something you said there, Mr. Martin, about what would you think if President Carter—well, as far as I know, President Carter hasn't said the same thing as old Louis the XIV, as far as I know. Now, we have had Presidents that have said that they are the Commanders in Chief of the country. We have two Presidents that use that expression. Now, I am waiting to see how long it will take before President Clinton says that.

Now, there is a big difference between being Commander in Chief of a country and being Commander in Chief of its armed services. And if the idea that President Clinton would be sued in

a civil capacity by some foreign subject is being unthinkable, I would say that if in a private capacity President Clinton went and involved himself in the Bank of England in a speculative way and lost somebody's money, that he shouldn't be immune from civil suit. But certainly in the sense that he is a head of State in our country is not the equivalent of the meaning of the Emir's State of—head of State definition, because in his definition, he is a head of State. He is the State. And in our system, of course, that is not true. But nevertheless, that is not really the main point at issue.

As I see it here—

Mr. MARTIN. Excuse me, sir.

The CHAIRMAN. Sure, of course.

Mr. MARTIN. In saying that in my written statement, I was simply trying to use the example of President Clinton to underline the practical basis under which over many years this doctrine of head of State immunity has arisen.

The CHAIRMAN. I believe that the professor here has given us a pretty good idea, and I do recall the circumstances of the 1976 act and I think the Senator was correct. It was under very different—it was very much like the Gulf of Tonkin resolution in 1964, you know? Who was going to think that a President would use that as a basis of waging war later on? The immediate emergency was that he wanted to have the moral support of the country, and, of course, the Congress at a time of urgency where our ship had been fired upon by Communist elements. So it is the same thing here.

As I see it, our duty is plain, and it is a duty that we should not abrogate as a committee having jurisdiction on our banking and financial system, and above all, charged with the oversight of safety and soundness, and from that standpoint, the impact that a State Department dictum—now the question—one real question I had for you, Mr. Albright, my understanding is that when you first approached the State Department, they told you categorically they intended to grant that immunity.

Mr. ALBRIGHT. That is not—not accurate.

The CHAIRMAN. OK. That is what I wanted to make sure.

Mr. ALBRIGHT. I really did not take this issue very seriously, nor even the consideration of sovereign immunity by the State Department. I had been told and informed by our counsel and the counsel for First American that unknown to us there was consideration at the State Department well before our lawsuit was filed in May, when overtures had been made by the attorneys, Patton, Boggs, for Sheikh Zayed to ask for sovereign immunity in the broader sense and the special sovereign immunity to the Sheikh and his sons. And I really considered it really so far out that I didn't take it seriously.

I finally wrote to a fellow New Yorker who ultimately became Deputy Secretary of State, the Honorable Clifford Wharton, telling him that I wanted to visit him in order to tell him about the larger issue of international reciprocity of sharing information, and ultimately, a day or two before he resigned his office, he had made an appointment with Mr. Corbin and me and Senator Mathias to meet to discuss the issue.

Subsequently, we then ended up meeting with the counsel to the State Department, made a presentation, and my sense, in all can-

dor, is that they had gone a long distance down the line that Mr. Martin is espousing, and that our presentation, and particularly the points that were mentioned by Senator Mathias, which pointed out that we are dealing with a possible, among other things, human rights issue here as well as sovereign immunity, slowed them down. And in my comments I made clear that I think that they are seriously considering our views, but I have no confidence that a serious consideration of our views is all that encouraging.

Most of the time when I was practicing law, if I had what I thought was a very favorable attitude on the part of appellate judges, and I thought I was winning, I found that I was losing. So I find that I have learned a little bit so I think we need great support.

Mr. MARTIN. Mr. Chairman, may I correct one misimpression that Mr. Albright may have that came out in his answer just now? We certainly did not—we had no reason to approach the State Department with regard to head of State immunity prior to the filing of his lawsuit. His lawsuit, I believe, was filed sometime around the end of June.

When it came to the attention of the UAE Government, the UAE Government sometime in July sent a diplomatic note to the State Department notifying them that Sheikh Zayed was indeed their sitting head of State and asking the State Department to consider a suggestion of immunity. As counsel to the ruling family in this country, sometime, I believe it was around September 1, and a person behind me can correct me if I have misstated that date, we had requested a meeting and certainly not at the elevated levels of the State Department with which First American deals, but what we thought was the appropriate place for a lawyer to go in and to the acting deputy legal advisor to say, Have our clients fulfilled all the procedures that have to be done to make an application to the State Department for head of State immunity?

This is what has been done. We have followed the guidance since then of the State Department. To the extent they have asked us questions on points of law, we have provided them with written briefs on points of law, and this is the sum and substance of what we have done.

I would like to say, Mr. Chairman, that I think that the policy issues that I have—both that I read when you sent the invitation to us as well as what I have heard you enunciate today, I believe are very important policy questions and I am glad that your committee is seriously investigating them.

I do want to reiterate what I said in brief in my statement and it has been reinforced to me both by hearing some of the comments here today and also looking at a *Wall Street Journal* editorial that was just handed to me, that, you know, because the policy issues you are considering are so important for the U.S. banking system, that you have got to proceed on the basis of good, sound information and what the facts are and what the law is. And I think this case, I have certainly seen—I have been involved in it for several years—the media has a tendency to pick out the more titillating aspects of the case. They are seldom accurate. And I really feel for you to go forward in a way that will be most helpful to you and

most helpful to this country in protecting our banking system is to make sure you have correct information.

Now, I do not wish to take up the time of this committee, but both in the testimony that you have heard this morning as well as in this *Wall Street Journal* article, I think there are a number of specific inaccuracies of which you should be aware as you continue your deliberations, and I would be happy to discuss them now or at any time you wish.

The CHAIRMAN. Well, since you bring up that editorial, I was made aware of it by the staff. Now, *Wall Street Journal* editorials, sir, are a sort of a thicket I wouldn't want to get into, but they have a tremendous reporters' staff. They have probably the best slate of reporters of any journal, however, and when I read that editorial, with my apologies to Mr. Albright because I mean no offense, they stated that I reacted to Mr. Albright's request.

Now, we had been triggered off prior to Mr. Albright's. Senator Mathias had written originally before, had correspondence from—but, these are things that are going to happen. You know, shoot, how can you write a newspaper story, now an editorial, I guess you have to have some angle too. But I wouldn't worry too much about the editorial and its input in our legislative product.

Mr. MARTIN. Frankly, sir, I wasn't worried so much about the editorial except for the fact that some of the misinformation or mischaracterization that occurred in the editorial frankly has also become part of the record this morning.

Mr. ALBRIGHT. May I just say that I have chosen not to have this a place for engagement or dispute on a matter that is before the courts, and I have not chosen—

The CHAIRMAN. I would like to have the power of a presiding judge, you know, and wouldn't take me too long to make a decision but—not that I am prejudiced, but I think that we don't want to stray.

Mr. ALBRIGHT. I agree. That is why I have chosen not to respond.

The CHAIRMAN. I understand that. And we are patient because given that we don't have too many members here, we can indulge a little and have a little leeway. There was one thing, though, and this brings you in and also what you said, Mr. Martin.

You pointed out that in 1991 your client shored up the bank. But in 1991, when you say you visited him and that the Emir is cooperating and wants to, but my question is, first question is, what is the Federal Reserve counsel talking about not being able to get the documentation they have been seeking?

Now, when he said that they were trying, the record shows that they have been trying for 3 years. So how do you explain that in view of your statement that the Emir or your client is cooperating and has nothing that he wished to withhold?

Mr. MARTIN. What I took—and this is simply a paraphrase, I don't mean it to be exact from Mr. Mattingly's testimony—was that Abu Dhabi provided substantial financial support to the bank during that period, that Abu Dhabi provided documents important to the Federal Reserve's enforcement actions, that document production was continuing, that we were currently discussing further access and that access has not been refused. That is what I took in paraphrase from his testimony.

And the way I would start that by getting to your question, sir, is that we have been working in concert with a number of investigative and regulatory law enforcement authorities. We have been working with the Serious Fraud Office in the United Kingdom. We have been working with the Office of the District Attorney of New York. We have been working with the Department of Justice. We have been working with the Federal Reserve and we have been working with the attorney general of the United Arab Emirates who is in charge of their investigation of the fraud which affected that country so much.

As long as you have got sovereign entities like the United Kingdom, the United States, the responsible agencies, and the UAE working together, all of them have investigative priorities and legislative priorities. There have been times we have been providing—we have provided documents since the documents that were referred to in 1991. At that time there were 400,000 documents shown to the Fed which we as counsel to our clients had not yet seen, but it was so important for them to get on top of what has been threatening the U.S. banking system and the First American Banks, we said, You take a look at them.

Out of that, they extracted 10,000 key documents which they thought were important to enforce whatever they had to do against BCCI and some of the principal malefactors in this case. We let them copy those documents and take them back to use for their investigatory activities.

Since that time, as specific investigative priorities have been identified, whether by the Serious Fraud Office or by people like the Justice Department and the Office of the District Attorney of New York here, we have tried to be helpful. They have come to us and said, We need documents on the following information. We have made them available. We are continuing to engage in this sort of cooperation.

The Serious Fraud Office made three visits to Abu Dhabi this summer over the course of 4 months to assist in their investigations. This whole process of government-to-government cooperation is continuing. It takes time—

The CHAIRMAN. Pardon me for interrupting you. You said that. You said that before. What I had reference to is that you also said that in 1991 you went to Abu Dhabi, that as a result, your client was aware of BCCI's activities somewhere, but 2 years before that and the year before that, you had the prosecutions in Florida where you had the indictments and the convictions of three of the officers of BCCI and for which, and I am sure the trustee must have looked over the records because when we had our hearing and had Mr. Clifford here, he admitted to the fact when we told him that we had documentation that we had gathered as a result of our subpoena from the bank showing that he had orchestrated the legal defense for these defendants of BCCI in Florida to the cost of \$45 million through the First American.

Now, to me that was a very significant point. You know, \$45 million for defense is no chicken feed, and certainly it shows that BCCI must have had a tremendous pervasive influence if that amount of money was able to be diverted and orchestrated by the

head officer of the First American to defend the miscreants in Florida.

Now, it seems to me by that time, by 1991 it was fully established—and also other areas in the world—that BCCI was being used in a way that was not wholesome, and this is the problem that I see emerging in these movements.

For instance, nothing has changed. The reason that the prosecutions were successful in Florida was because of a very able Customs official who went underground, infiltrated the money launderers from South America and other places and found the BCCI ready, willing, and open to do that kind of business in Florida.

Nothing has changed. That is still going on.

Mr. MARTIN. Mr. Chairman—

The CHAIRMAN. Now, I don't say BCCI, no, but the methods and the processes used, which is what we are interested in, are still out there in our country and that worries me considerably.

Mr. MARTIN. Mr. Chairman, we are interested in the methods and the process used, and if I could go back and walk through with you the timing of all of this, I think you will understand where we have come and what is happening.

The CHAIRMAN. Let me say this. Let me interrupt you, if you will yield to me, and I hate to interrupt you because I think—I want to listen to you, but I don't think it is necessary to repeat what I think—I don't doubt one minute that by 1991 the—your client was very sincere in saying, hey, look, I don't want to have anything to do and I will cooperate, and you have described that you did and provided the Federal Reserve what it asked for at that time.

The problem I see now is, why is the Federal Reserve still saying that they can't get access to documents they need?

Mr. MARTIN. Please let me explain, sir.

The CHAIRMAN. Especially, in view of the testimony by Mr. Mattingly, that if the request is granted on sovereign immunity, then their case is gone, documents or no documents.

Mr. MARTIN. It does not mean that cooperation is going to be gone. Please let me go back to 1988.

The CHAIRMAN. OK.

Mr. MARTIN. In 1988, my clients in Abu Dhabi were minority shareholders in BCCI. They were not even in the aggregate, with all of the Abu Dhabi interests, the largest shareholder of BCCI. There was a Saudi Arabian commercial family.

Abu Dhabi had one member on a seven-man board of directors of BCCI in 1988, but generally they did not take an active role. Generally, no. They simply did not take an active role in this bank. They had a person sit who was a named member of the board. Given his other official responsibilities, he was able to appear and participate in about half of the board meetings.

Abu Dhabi, through this one board member, had to rely substantially on the outside auditors and the regulators of the bank to tell them, and on management's reports, to tell them that things were all right with the bank.

Yes, this drug situation in Tampa was a terrible thing. I think if—BCCI, all of these records about that period of 1988 have now been turned over by the liquidators to law enforcement authorities.

They have seen what was told to the board of directors, including Abu Dhabi's representative, and the board was reassured and at that time had no reason to disbelieve that this was an isolated incident, that these were a few rogue officers of the bank, and Abu Dhabi didn't frankly, perhaps—perhaps they should have thought more closely, but they did not perceive any reason for undue alarm.

It wasn't until the period of March, April, 1990 when their independent auditors, whom they had always relied on and as one board member, this is what you have to rely on if you are an outside director. That and the regulators, how can you understand on the basis of a few meetings a year what is going on in a bank that is involved in 73 different countries.

Finally, in 1990, early 1990, their independent auditors were saying, there are serious financial problems in this bank. There are problem loans. There are overdue loans that are very large, and something has to be done. We can't publish the financials.

The board of directors, including our client who was on it, brought in the Bank of England as a result of discussions between the Bank of England, the auditors, and the board. The Bank of England leaned very heavily on our client to put significant additional capital, \$1.2 billion, into the bank before the financials were released in order to shore up the bank against the bad loans that had been perceived. At this point in time, our clients and the Bank of England were still looking upon this as a management and bad commercial practices problem.

It was not really until the Bank of England asked—and our clients asked—Price Waterhouse to continue looking into these matters. Meanwhile, and I just want to get—because in testimony in this *Journal* article, there is something surreptitious about what is said about this flying of documents in 747s. This was in April that we very unfortunately became the majority shareholders and picked up the problem for BCCI, this terrible, appalling bank.

The Bank of England and the College of Regulators that regulated the bank, the Luxembourg Central Bank, the Cayman Islands Central Bank, and three other central banks that were charged with regulating BCCI, told our clients, We think you can supervise this bank better now that you are the owners if the headquarters of this bank moves from London to Abu Dhabi. This was in May 1990, and between May and October 1990, those records were moved with the knowledge and indeed with the direction of our bank regulators. They were not secretly flown away by anyone.

Now, in very early October, Price Waterhouse came out with its second and very devastating report which, for the first time, clearly showed that the problems in BCCI were simply not a matter of bad commercial practices, a few mistakes here and there, lending too much to some favored—

The CHAIRMAN. Mr. Martin, if you please, that is a matter of record. We have had that from the beginning. Price Waterhouse's role, not only in Europe but—

Mr. MARTIN. I am trying to tie it in, Mr. Chairman, to the relationship of our client. October was where our clients began to look into this. That was when the Bank of England and our clients asked us to start doing an investigation. That is when we came up

with this information which we started giving to the Federal Reserve.

The CHAIRMAN. Well, sir, if you don't mind, I am going to stop right here because you have now used equivalent time to what I used and it has been excessive in view of the fact that I have two patient members here. We can come back later, but let me recognize Mr. Leach at this point.

Mr. LEACH. Well, thank you, Mr. Chairman. And let me also welcome the distinguished panel, particularly Senator Mathias, who I consider to be one of the model legislators of the century.

Mr. Martin, your testimony suggests that the Sheikh was a victim in the case and Mr. Albright's testimony suggests that the Sheikh wasn't a dupe but was a knowing participant. You have two different perspectives. Both of you from a very considered perspective, defended and presented reasonable cases on behalf of your clients and your institutions. That is understandable.

Nevertheless, Mr. Martin, some have suggested, as the chairman pointed out, that the Sheikh took quite a while to let regulators view all BCCI documents. Maybe there are some that are yet to be reviewed. Some have also questioned why many key BCCI figures have been quartered in Abu Dhabi, apparently, under house arrest. Is this a valid circumstance? Have figures been put under house arrest, apparently under luxurious circumstances, to allegedly straighten out stories? Is that a valid situation or is that—

Mr. MARTIN. Congressman Leach, this is one of the situations—

Mr. LEACH. A story that there is no basis in fact?

Mr. MARTIN. Let me explain and I am only smiling because it is one of those, we are damned if we do, we are damned if we don't, so the best thing I can do is tell you what the facts are.

Mr. LEACH. Sure.

Mr. MARTIN. The facts are, as you say, we were the principal victims. We acknowledge and are deeply concerned about depositors around the world that lost money. And not out of any legal obligation, but out of concern for those people, we worked very hard to work out an arrangement with the global liquidators which the court in Luxembourg recently said was technically defective, and that is a matter that I presume will be under future discussion. It is not here.

As the principal victims, we had to look to the people that the initial information we were getting suggested had carried out these crimes. Because the Bank of England had directed us to move the headquarters to Abu Dhabi, senior bank management was in Abu Dhabi and when we had gone far enough in our investigations to conclude that serious questions were raised about the criminal conduct of some of these senior managers, they were put under detention. This was done not by Sheikh Zayed, my client.

There is a ministerial form of government organized under the constitution of the United Arab Emirates which has a series of civil courts separate from the executive branch and separate from the ministry of justice and the UAE attorney general. They determined to put these people under detention.

The attorney general then went to the court and asked for this detention to continue until the attorney general could complete his investigation of this matter.

Now, we were—I say “we”; the people in Abu Dhabi who were responsible, who had the job responsibilities for this were in a difficult situation. They face the—they face the prospects of the very daunting investigatory processes. Mr. Morgenthau in New York has had a grand jury looking into BCCI matters for 4 years and he has much more sophisticated financial fraud people at his disposal than does the attorney general of the UAE. They knew it was going to be a long investigation and they also had substantial reason to believe—and went to the court to make the presentation—they had substantial reason to believe that if these detained executives were allowed to go free during their investigation, that they would flee the jurisdiction and the justice—they could not bring them to justice. Based on that determination, the court agreed to their detention.

Now, since there were questions, as we have said, of possible rights of these people, since they had not at that point been formally charged, yes, they were kept in—they were not kept in jail cells. They were kept under control, but in relatively comfortable surroundings. They were allowed to have family visits. They were allowed to have lawyer visits. They were allowed to telephone outside, but they were kept from fleeing the jurisdiction while this investigation went on.

The investigation conducted in Abu Dhabi took certainly no more time, about 15 months, no more time, indeed less time, than investigations that are still ongoing here have taken. They were—these people were formally charged perhaps 6 months ago and their trial has started. They are all represented by counsel. We have heard no allegations from their family or counsel that they have been mistreated or any basic rights of due process or unfairness have been denied them.

Now, court procedures in the UAE are not exactly the same as in the United States, but we have heard nothing of that. That is the situation with—

Mr. LEACH. Mr. Martin, you are a distinguished attorney representing a distinguished law firm, and you have every reasoned right to ensure that due process occurs in this country for any client, but do you find it a little bit uncomfortable to defend the legal processes of the UAE?

Mr. MARTIN. Do I find it difficult to defend the legal process in the UAE? As I have seen it unfold, I am simply not that familiar with it other than in this particular case and the way in which they have conducted themselves to date. No, I do not.

Mr. LEACH. It is my understanding, at least it has been reported, that the Sheikh was a long-time financial supporter of Agha Hasan Abedi, who was the founder of BCCI. Is it credible to believe that he was unaware of BCCI's secret ownership of First American, given the fact that the Sheikh in his interest owned 22 percent of First American's holding company, and that he also owned BCCI stock, and in fact, was a majority shareholder of BCCI for several years?

**Mr. MARTIN.** In the first place, yes, Sheikh Zayed, from the late 1960's—let me first try and give some characterization to Sheikh Zayed. He is a very decent and honorable person. Before the British left east of Suez, he was a leader of the Emirate of Abu Dhabi; he performed the functions that a leader in that type of society traditionally performed of dispensing justice, making decisions about how they would deal with tribes, with camel stealing, dealing with foreign powers.

Sheikh Zayed was not then and has never been a commercial person. Whether as a ruler of the Emirate or even as President of the United Arab Emirates, he has never engaged in any extent in commercial activities. He did make the decision early on, much to his regret later on, that he would be happy to put his money in a bank run by this Mr. Abedi. That was made back in the late 1960's. He certainly didn't follow this.

It appears that a substantial basis for this decision was because Mr. Abedi was of the same religion, and was one of the few people of the same religion that Sheikh Zayed had ever been introduced to that also seemed relatively sophisticated about modern banking, which at that time in the Emirate's development was pretty much an unknown concept.

Your wealth was measured in terms of your camels and your gold, and you kept your camels outside your tent and your gold very close by. You say Sheikh Zayed owned the bank—BCCI—for a couple of years and should have known what was going on. He owned the bank from April 1990 on. The Gulf war intervened in early August 1990, and by October 1990, his people had discovered this fraud and had retained us, and within a month, we were authorized to come in and start talking to the—the first thing we said to Mr. Mattingly was we don't know the whole story and we are not making a representation that this is the full truth, but we have heard it is of concern to you, and as we learn information, we will give it to you, and that is what we did.

**Mr. LEACH.** Fair enough. The FDIC apparently suggests it lost \$100 million when it had to pay off the deposits at Independence Bank in California, which was a BCCI institution. Is there any indication that your client is going to reimburse the FDIC for the \$100 million?

**Mr. MARTIN.** No, sir. Let me explain a couple of things. First, it was the documents that we provided—the information we provided the Federal Reserve first in January 1991, and in the documents we provided them in March 1991, which enabled them to find out what was going on and to deal with it, and I didn't know the \$100 million figure, but it would have been a lot worse if we hadn't been able to supply them with the wherewithal to get on top of it.

Now, our client had no shareholding in Independence. Independence was a bank that BCCI got involved in before our clients had purchased the bank in 1990 and before we knew anything about this, and frankly, we don't feel any responsibility for this, and we have taken no actions in that direction.

**Mr. LEACH.** Fair enough. Senator Mathias, I understand from the RICO suit against the Sheikh and others that Ghaith Pharaon is one of the defendants. In that suit it is listed that his address is

unknown. It has been suggested that he is living somewhat openly in Paris. Is that known to—

Mr. MATHIAS. That is not known to me personally. Let me ask counsel.

Mr. LEACH. Is there any desire that he might be brought back to this country?

Mr. MATHIAS. That is something we are not aware of.

Mr. LEACH. All right. Let me just conclude with a query to Professor Dellapenna. You have commented on the effects of the Foreign Sovereign Immunities Act. We don't have any analogy in this country, do we, of a current President's immunity act; that is, all American citizens are accountable for any misdeeds that they participate in; is that correct?

Mr. DELLA PENNA. Well, I think in the case of *Nixon v. Fitzgerald*, the Supreme Court did say that the President was immune for suit for official actions. I do not read that, unlike Mr. Martin, I do not read that as a doctrine that the President is absolutely immune from suit.

If a President of the United States, President Clinton or Nixon or any other President you want to think of, simply in a domestic context were to become involved in a dispute that ended up in court that was not—that did not arise out of his official acts, I don't see any legal basis for the President to claim, even while in office, that he is immune from suit. I don't believe any court would so hold.

Mr. LEACH. Now, this would apply to activity during or prior to the Presidency; is that correct?

Mr. DELLA PENNA. During the Presidency, and I think it makes no difference whether the litigation were brought while the President was in office or afterwards.

Mr. LEACH. But if the activity were prior, but the President during, one wouldn't have to—

Mr. DELLA PENNA. I don't believe—certainly, the President would not be immune if the activity were prior and the suit were brought while he was in office, but I also think it would be equally true if it did not arise out—if the litigation did not arise out of the President's official actions, I think it would be equally true if the activity were while he was President and the suit were brought while he was President.

I don't see any legal basis for the President to claim immunity.

Mr. LEACH. Fair enough. Thank you very much. I have no further questions.

The CHAIRMAN. Mr. Frank.

Mr. FRANK. A couple of questions. Mr. Martin, on the documents, I just have a question that arises out of something that you said. Why would there be a problem if the Federal Reserve just wanted to copy all of the remaining documents? What is the obstacle to that, I mean other than they don't want to pay for the copying? I mean, you have copying machines. What is the problem?

Mr. MARTIN. There is no particular problem.

Mr. FRANK. So if the Federal Reserve wanted to copy all of the remaining documents, then that would just resolve everything and they would take copies?

Mr. MARTIN. I think Mr. Mattingly was careful, Mr. Frank, to not get into too many specifics. He did note that discussions were actively continuing.

Mr. FRANK. I understand that, that is fine. But I am not Mr. Mattingly and I am not cautious. I don't understand why—Mattingly is dealing with you and he has to be nicer to you than I do.

Mr. MARTIN. I don't think that is the case.

Mr. FRANK. What objection would your client have to simply letting the documents be copied, bang, over? What is the problem? Unemployed lawyers?

Mr. MARTIN. That may well be one of the things we are working on—

Mr. FRANK. I didn't ask you if that was one of the things you were working on. I am saying the question of accessibility to documents has become sort of one of the tests of good faith. I understand the problems of the people that are involved in it, but you said they copied 10,000 documents.

If in fact there is nothing that—if the government of Abu Dhabi interposes no obstacle here to the documents being made available, I don't understand why you don't say come and copy them, take what you want, bring them home. What is the problem with that?

Mr. MARTIN. That very—that type of question is the sort of thing that is very actively being discussed between ourselves, the Federal Reserve, the Office of the District Attorney of New York, and the Department of Justice.

Mr. FRANK. Why does it have to be discussed? Why isn't the answer, yes, bring your copier and you can do it. I don't understand why it has to be discussed.

Discussion assumes that somebody has raised it and somebody else has objected to it. Otherwise you don't discuss it. So why is there an obstacle to just doing it? What are you discussing?

Mr. MARTIN. I think, sir, that quite frankly, one of the most important reasons about copying is that we once tried to figure out—we once put someone to looking at how long it would take to copy all of the documents that are currently in our possession, and it was something like 6 months.

The reason why I don't want to get into specifics—

Mr. FRANK. You bring over some mobile copiers, we got some extra people. I honestly don't believe that is the problem.

Mr. MARTIN. Please, sir, let me tell you what we are doing instead of that.

Mr. FRANK. No, I won't. We can talk about that later. But I don't want to get off this subject, because I have to tell you I am skeptical of your argument that you are ready to cooperate.

Mr. MARTIN. We have shared with the relevant U.S. authorities indexes to the documents that we have, and they are now looking at those to see what—

Mr. FRANK. And are they going to be allowed to copy any ones they want?

Mr. MARTIN. That is what we are talking about.

Mr. FRANK. I know that is what you are talking about. Please, Mr. Martin. That is insulting. That doesn't mean anything. We are adults.

In the first place, I have this problem, if you are just talking about it, that means somebody is saying no. If you are in good faith in this situation, why can't they simply copy whatever documents they need? And why don't you just say yes to them on that?

Mr. MARTIN. I am not trying to be disingenuous; I came here to discuss the issue of head of State immunity, and I came here to discuss the impact of this doctrine on the safety and soundness of the banking system; I frankly—the discussions that are going on are going on government-to-government.

I don't feel that comfortable that I should go into any further details about it.

Mr. FRANK. I take that frankly as a sign that the case is not a very strong one, and that there is a resistance on the part of the government that you represent to make them available. I would point out—the statement of the Abu Dhabi ruling family before the committee talks about the offer of documents.

So I hardly think I have introduced an irrelevancy or I was the first one to bring it up. You didn't mind discussing it when it was going better, I should tell you. I mean when you could give evidence of how cooperative you were, you talked about it. But your failure to answer that simple question bothers me.

Let me ask you another question, it has to do with the documents' future. You say that one way to deal with this in the future would simply be to require a waiver of sovereign immunity from anyone who should be similarly placed as a Sheikh, is that correct? Or at least the statement does. This is the statement of—

Mr. MARTIN. You can take that as our statement.

Mr. FRANK. That is your statement, OK. Well, in the future just make them waive sovereign immunity, correct, it says that?

Mr. MARTIN. That is one way to handle it.

Mr. FRANK. OK. So then what we are talking about then is not a policy issue, I guess, but a fairness issue for the Sheikh. I mean you have, it seems to me, conceded that there would be no problem of having a head of State subject to our banking laws and not having any immunity.

Mr. MARTIN. The Sheikh considers himself—the Sheikh does not consider himself above the law. That is why he—

Mr. FRANK. Mr. Martin, you have a talent for answering questions I didn't ask you. The question is, apparently there were no policy grounds against—that require sovereign immunity, but if you are proposing that from here on in, we could make it a condition, you can't do banking business in the United States unless you waive any claim you had to sovereign immunity, correct? It seems to me that that was what was in your statement.

Mr. MARTIN. Excuse me. What is the question?

Mr. FRANK. The question is, doesn't that mean then that there are no foreign policy or other reasons to insist on sovereign immunity, that it simply has to do with whether or not your client was fairly warned that he might lose it?

Mr. MARTIN. No, I am thinking that—you asked us to comment on this. I think this is one way that it can be dealt with. I think that the committee, in considering this, will want to consider the background of why the United States has up to this point in time—

Mr. FRANK. Mr. Martin, please don't do this. You are just getting off the subject. I am asking you a very specific question. The subject is, page 38 of your statement: "The appropriate—

Mr. MARTIN. I don't have the statement in front of me.

Mr. FRANK. Page 38 of the statement of the ruling family. The bottom second paragraph, "The CDC Act provides for the disapproval of a proposed acquisition if the Federal bank regulatory agency has concerns. The appropriate"—let me skip to the last sentence on that page. "The appropriate Federal bank regulatory agency would have the authority to, and presumably would, condition its approval of the acquisition of control by a head of State on his agreement to waive his immunity with regard to enforcement actions that might be brought by such agency in connection with the U.S. bank."

That sounds to me like you think that would be OK.

Mr. MARTIN. Yes.

Mr. FRANK. So then what I am saying is; it seems to me that helps collapse this, and then there were then no policy issues left as to whether or not the United States ought to honor sovereign immunity for someone situated as your client, the simple question is whether or not your client had adequate notice that this happened to him, because you agree that for all future situations, explicitly say to people, if you come here to do banking business, there is no sovereign immunity.

So all of the arguments about what harm might be done if we did not recognize sovereign immunity seem to go out the window with that concession and the only question is are we being unfair to this particular individual who finds himself without it if he didn't know that. But from now on, it is going to be a notice question only.

Mr. MARTIN. Sir, there is still a policy issue in that the issue didn't arise in connection with my client because he didn't seek acquisition of control of the U.S. bank. He sought and obtained a minority interest, he disclosed that minority interest, he made all the appropriate filings.

Mr. FRANK. But he became in control.

Mr. MARTIN. He never came in control.

Mr. FRANK. So your argument is not for sovereign immunity; if he was in control, you would have no objection to—then there would be no claim of sovereign immunity? I mean from what you just told me, I infer that if it were agreed that he were in control, then sovereign immunity wouldn't be raised.

Mr. MARTIN. I am just pointing out—

Mr. FRANK. You just said to me, well, wait a minute, he wasn't in control, but that suggests that that is relevant to the question about whether or not he should have sovereign immunity.

In other words, if he were in control, there shouldn't be sovereign immunity?

Mr. MARTIN. I think that the waiver issue as we have said, and as the Federal Reserve has said, is a potentially useful tool for dealing with this issue.

Mr. FRANK. You didn't say it was a potentially useful tool, you said that we could and presumably would condition approval, and you told me you thought that was OK. But you just said he wasn't

in control, and therefore, it shouldn't apply to him, but that suggests to me that you think that if he was in control, that he shouldn't have the sovereign immunity, or that there would be less basis for it.

Mr. MARTIN. I think that Sheikh Zayed should be entitled to have the law applied to him as it is currently—as the law is currently in the United States.

Mr. FRANK. But it is a notice question rather than a policy question. That is, you don't object to changing the law as if you say it from here on in, no one would have that, so that is not a problem.

The last question has to do with the suits. I have this one problem with the reciprocity of it. I mean, under your interpretation, can the Sheikh sue them but they can't sue him back? Is that correct? They can sue him, you say they owe \$200 million.

Mr. MARTIN. No, sir, that is not the case at all.

Mr. FRANK. Do you think that he should be able to—

Mr. MARTIN. If the Sheikh were to sue them, he would be coming in to seek the affirmative assistance.

Mr. FRANK. So he would waive the sovereign immunity in that case?

Mr. MARTIN. Yes, yes.

Mr. FRANK. So if they don't pay the \$3 million, they can't sue them?

Mr. ALBRIGHT. He did sue—Mr. Martin's client, Sheikh Zayed. He called it an—the request for relief, and he repeated it today and in a statement, if I failed to give him his \$200 million—

Mr. FRANK. But you said but finding an order for clarification does not waive the sovereign immunity; is that your view?

Mr. MARTIN. This issue is presently before the court, and I think we will abide by the court's decision in this matter.

Mr. FRANK. I am glad to hear that.

Mr. MARTIN. I would tell you that, Mr. Congressman, that our legal view in the matter is, no, we didn't sue Mr. Albright to get our debt repaid. We wrote a letter to Mr. Albright and said, gosh, you did a great job selling this bank, we weren't sure if we would ever see the money that we have loaned in the last 2 years back, but you made some money on the sale, it looks like you can pay us back. When are you going to pay us?

He said, I am going to pay you after I investigate all of these things. We said, what does this have to do with the bona fides of our debt to the corporation? And then we went to Judge Green and asked her to clarify what the scope of the role of the trustee was in terms of having the creditors of the bank.

Mr. FRANK. Suppose Mr. Albright chooses not to be clarified. What do you do then? That is, suppose he says, well, that is very interesting, judge, but I am not paying the \$200 million. Under your view, if you sue, you open yourself up to a reciprocal suit; is that correct?

Mr. MARTIN. That is a hypothetical that has got so many litigation implications, I simply can't answer it, Mr. Frank.

Mr. FRANK. I do think that we have a problem in having a one-sided sovereign immunity. I mean a one-sided—

Mr. MARTIN. I am acknowledging to you that if we were to sue in the United States, we would waive sovereign immunity.

Mr. FRANK. You would waive sovereign immunity. All right. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Frank.

Mr. MATHIAS. Mr. Chairman?

The CHAIRMAN. Yes, Senator.

Mr. MATHIAS. I would just like to make a very brief remark, because we have in the course of the morning strayed somewhat from the initial subject. We have covered a lot of ground.

Mr. FRANK. Senator, that should hardly be surprising as someone who serves in the U.S. Senate. It is just the House exercising a little Senate envy.

Mr. MATHIAS. I accept that judgment, harsh as it is. But the fact is that we have made a record here of what has been said. It has not just been testimony written on the wind, and I do not want it assumed that silence gives assent.

I wouldn't want to let it be considered that I agree with everything that has been said. There has been some recitation of events in which I participated, and I think it is a very natural thing that we look back on the past with a somewhat selective memory. We remember the things that we want to remember very often, and my memory may be equally selective, but I may have a different recollection of events.

I don't suggest that this is the time or the place to go back over all of these events, Mr. Chairman. That is why judicial proceedings exist, so that you can bring all of the witnesses together in a single courtroom and get all of the different points of view, and then try to hammer out what in fact is the truth. So there will be a time and a place to do all of that.

I just didn't want to let the record remain silent on this question. The question of the records, for instance, I think is very simple to solve. An application can be made to the Justice Department, to the Federal Reserve, to the district attorney of New York, and to some of the foreign jurisdictions that want to make investigations and want to have access to the records, and I think very quickly that situation can be determined.

Finally, Mr. Chairman, I am troubled by one thing. There has been repeated repetition of the fact that Abu Dhabi is the biggest victim. And, of course, repetition isn't probative. In the absence of the records, it is very difficult to tell whether Abu Dhabi was a victim.

Certainly, they were informed of what was going on over the years. It seems to me that there was money in and there was money out over a decade, and without the records, we will never know what is the balance. In fact, the biggest victims were the depositors who may have been individually small, but were collectively very large, and their loss occurred without their knowledge, which is in contrast to the Abu Dhabi situation. Whatever else Abu Dhabi may have been, it was informed of the facts.

Thank you, Mr. Chairman.

Mr. ELIAS. Mr. Chairman, can I just add one comment?

The CHAIRMAN. Yes, Mr. Elias.

Mr. ELIAS. Just moving to two quick points, I want to add them, that we are very grateful to First American Bank, because without that action, it is a world economy now, it is not a U.S. economy,

it is a world economy, and I feel that the case of First American is not a case of First American against Abu Dhabi, no, I think it is a case against all of the victims, that is half a million of them suffering severely, and we feel that the hope we have now is the First American case.

I think the world was changed on June 27 when Mr. Albright filed that lawsuit in the United States. It is a world economy. We are hoping that the United States is going to work for the whole victims to support them, and that is support we could not find from other countries.

So we are feeling that this is our hope, that somebody has to pay the penalty for what happened.

My other comment is the files. I would like to refer people to the judgment of the Luxembourg court, which only being translated 2 weeks ago, and the judgment is very clearly indicated, that Abu Dhabi has to bring back the file to the jurisdiction of Luxembourg or whatever it is.

We heard from the responsible people in the liquidation that they only saw 10 percent of the files. So I just wanted to add this comment to you, and living with BCCI problems every day, only 10 percent has been seen.

So we feel that this First American Bank action, it is a great success, we support it, we are fully behind it as victims of this saga, because it will help the whole victims, not only helping an American situation.

Thank you, Mr. Chairman.

The CHAIRMAN. Well, thank you, Mr. Elias.

In fact, I had prepared some questions, but you answered them with your testimony. Thank you very much.

Your information with respect to the judgment in Luxembourg recently is good. We are going to have the staff get some copies of that.

I had one question. I know the hour is late, but this is for the professor. As we have—and I think you touched on it, but I wanted to get a little enlargement or expansion on it from you. We pointed out how this head of State immunity is not the only type of immunity claimed in this particular case.

Another defendant, for one, claims to be immune from suit under the Foreign Sovereign Immunities Act because his actions comprised part of his official duties as a high-ranking member of the government of the United Arab Emirates. He was the director of the President's court. He also claims that the court should decline to accept jurisdiction under this act.

I wonder if you could elaborate a little. I know that you had a suggestion, but I think if you could give us a little bit more as to what your opinion is of this type of claim.

Mr. DELLAPENNA. Well, I think there is actually fairly good precedent for applying the Foreign Sovereign Immunities Act to shield high level officials of foreign governments in a derivative immunity, even though there is nothing explicit in the statute or its legislative history to support that.

There are I believe now close to half a dozen cases in which courts have done that. But again if that is true, if that is the correct interpretation, and the Supreme Court of the United States

has never passed on this question; there seems to be enough precedent for it to say with some confidence that it appears to be true.

That is not the end of the inquiry, that is the beginning. Because it still leaves the question of whether the activity is immune in the terms of the act. Just because it was an action undertaken by a government official does not make it absolutely immune. It is still—there are still questions in this context of whether the activity was commercial as that idea operates in the statute, or whether it was noncommercial, and, of course, I am not in a position to venture an opinion on the fact—on that mixed factual and legal question on whether his activities were commercial or noncommercial.

But he is not automatically shielded. That simply means that the statute provides the framework for analyzing whether he should be immune.

The CHAIRMAN. It was commercial. He was a stockholder.

Mr. DELLA PENNA. Well, if his activities are commercial, then he is not immune. That is the long and the short of it.

The CHAIRMAN. Well, not to prolong it, but that brings to mind our action in the capture of the head of State of Panama, and his imprisonment and trial in the United States. How does that—now, I don't know what the judicial status was of General Noriega, but it seems to me that there is some—if we can go out and capture the head of State and bring him in to be tried in a criminal court in our country, it seems that there must be some basic doctrine there that is involved.

Mr. DELLA PENNA. Well, I think—well, there are a number of answers to that. First of all, the Foreign Sovereign Immunities Act is irrelevant because it only applies to civil proceedings and not criminal proceedings.

The CHAIRMAN. That is true.

Mr. DELLA PENNA. But beyond that, General Noriega's attorneys did argue head of State immunity and the Federal district court ruled against them. Now, I believe that is on appeal; it has not been resolved by any higher court.

And it can be resolved, that case can be resolved essentially on one of three possible bases. The first one I think, and the one that is probably the correct explanation why he is not immune, is that our government did not choose to treat him as immune, because I think if you look at the cases where head of State immunity has been invoked with one exception, they all line up precisely in terms of whether the government, through the State Department or the Justice Department, has made a decision to treat this person as immune under this doctrine.

But beyond that, of course, in General Noriega's case, you have a question of whether he qualifies as a head of State, because he was not the President, he was commander in chief of the armed forces, and in his case our government has taken the view that only the head of State qualifies, although as I mentioned earlier, there are a number of cases where the wife of a President, the son of a Queen, Prime Minister, Secretary of Government, our government has also thought that they were qualified for immunity.

So it again suggests that there is not a principled application of this notion of head of State immunity going on.

The final question that comes up in General Noriega's case, if you decide that he was the head of State, as he claimed to be, he was, of course, no longer the head of State by the time the proceedings arose, and you have a question of whether one should lose one's immunity when leaving office, even though it was an involuntary departure.

And that is an issue, for example, that seems to figure prominently in the extended Marcos litigation in a number of courts in the United States.

The fact of the matter is, in our domestic context, go back to *Nixon v. Fitzgerald*, the Supreme Court said that if it was official actions and you were immune because you were President when you took those actions, that that immunity continues after you leave office.

And if the purpose of the doctrine is to protect an officeholder, somewhat like the discretionary function of the Federal Tort Claims Act, is protecting an officeholder so that the officeholder will make decisions in his or her official capacity without fear of consequences years, perhaps decades later, in litigation, then it makes sense that the doctrine ought to apply to former heads of State when the issue relates to their conduct while they were in office.

So there are a number of reasons given by the court as to why General Noriega is not protected by the head of State doctrine, but I think the only one that holds up is that our government didn't want him to be protected by that doctrine.

Mr. FRANK. Can I say that I appreciate the expansiveness in the answer, but the suggestion that he might have lost it in part because he had been deposed certainly, the deposer could not claim that. I mean, I think that really makes—

Mr. DELLAPENNA. The Federal judge seemed to be impressed by that argument.

Mr. FRANK. Well, I would hope that no one else would be, because then you are really making a mockery of it. If you are allowed to depose someone, I mean, that is really killing your parents and claiming credit for being an orphan. I would hope that that one would not get any credence.

Mr. DELLAPENNA. You might, if I could raise the Marcos situation, there has been both civil and criminal proceedings involving—

Mr. FRANK. Yes, but we didn't kick the Marcos out.

Mr. DELLAPENNA. Well, but they raised that claim. They claim that they were virtually kidnapped out of the Philippines.

Mr. FRANK. President Reagan was carrying the torch for them for years. But it is also very different than a situation where have you clearly, directly, and without any effort to hide it, kicked the guy out. I just wouldn't want to suggest that that was anything valid.

Mr. DELLAPENNA. Well, in my view, it is not a valid proposition of law, but it is a proposition that has been invoked in the Marcos case, they are no longer head of State, therefore, they lost their immunity, not only now, for things they do now, they have lost their immunity for things they did when, I say they, because several members of the family have tried to use this doctrine, things they did while President Marcos was President.

And our courts have said yes, you lose your immunity when you leave office, and the Federal judge in Florida cited those precedents for saying that General Noriega lost his immunity when he left office. And as I said, I don't believe that that is a correct application.

If there is a doctrine, I don't believe that would be a correct application of it.

The CHAIRMAN. But didn't that same judge finally decide, you know, after all of these arguments, that actually Noriega was a prisoner of war?

Mr. DELLA PENNA. That is another claim he has made, yes.

The CHAIRMAN. No, the judge, if I remember the report, finally decided, I think to clear this other legal question of immunity and so forth. But I am sure that the report I read was that the judge had finally said well, his status is one of a prisoner of war.

So anyway, I really want to thank you. You have been very effective and very helpful to this committee.

Mr. Albright, all I have to say is that you brought up the Morris Plan. My father, may his soul rest in peace, about 1932 lost everything he had in the Morris Plan Bank of San Antonio.

Mr. ALBRIGHT. I told you, Mr. Chairman, that I often didn't do very well before appellate judges. I am sorry I raised that.

The CHAIRMAN. But that name still rings a bell, naturally. Of course, there was a depression, and the banks were going bust. But it was a Morris Plan Bank and they were depositing their money there. He didn't have much, but compared to the—you know, if you could extrapolate comparisons, \$3,000 then would be like over \$30,000 today. So it really almost polarized the family ever after.

But anyway, unless any of you gentlemen have any further remarks you wish to make for the record or questions, we will consider this hearing as having been completed, and again, express my profound thanks for your help and cooperation.

And, of course, there may be some members who weren't able to make it who might wish to submit some questions in writing, and assuming they do by the time you receive the transcript of the proceedings this morning, we would appreciate if they could be replied to.

Mr. ALBRIGHT. Mr. Chairman, would it be possible to file any corrective statements from—

The CHAIRMAN. When you receive the transcript, you can correct them and modify or add thereto.

Mr. ALBRIGHT. Thank you, sir.

The CHAIRMAN. Certainly. Thank you very much, gentlemen. If I don't see you before, have a very, very happy and fruitful and healthy holiday period.

[Whereupon, at 1:37 p.m., the hearing was adjourned.]



## APPENDIX

December 9, 1993

Opening Statement of Henry B. Gonzalez, Chairman  
Committee on Banking, Finance and Urban Affairs

Hearing on Head of State Immunity

December 9, 1993

I would like to begin by announcing that today's hearing is the first in a series of hearings aimed at focusing attention on various abuses of our financial system. There is no doubt in my mind that at this very moment there are other BNL's and BCCI's that are abusing our financial system. The Committee has a responsibility to make sure that the government has taken the necessary steps to root out abusers of our financial system, whether they be off-shore money launderers or heads of state.

The second hearing in the series will focus on counterfeiting, its affect on safety and soundness and monetary policy. The counterfeiting hearing will be held in late January. Today we consider the issues surrounding head of state immunity. At the outset I want to make clear that the Committee is not here to take sides in the dispute between the Sheikh Zayed and First American. The courts are the proper forum to decide that issue and the Committee is neutral in that respect.

The Committee is meeting because I am concerned about how a grant of head of state immunity would impact the safety and soundness of the U.S. banking system. Sheikh Zayed's recent request for head of state immunity raises the fundamental question of whether a head of state or his nominees can violate U.S. banking laws and regulations, and then use their political clout to escape accountability for their actions.

I have long championed efforts to ensure greater oversight of foreign involvement in the U.S. financial system, especially participation by foreign government-backed entities. The recent BCCI and BNL scandals, which I helped bring to light, serve as a painful example of how vulnerable our financial system is to abuse by foreign governments.

Granting immunity to the Sheikh and his nominees would send exactly the wrong signal to similar persons wishing to engage in nefarious financial activities in the U.S. While I understand that there may be diplomatic arguments to the contrary, ensuring that heads of state are held to the same standards as other participants in our financial system should be our top priority. Because of the potential precedent of permitting a head of state to escape accountability for violations of U.S. banking laws and regulations, I am opposed to granting immunity to the Sheikh. I have sent letters to the Secretary of State and to Judge Green expressing my objection.

I am very disappointed that the State and Justice Departments have refused to take a public stand against potential abuse of our financial system by testifying here today. Given their lack of leadership, I have asked Committee staff to study the issue of whether or not legislation is needed to ensure that heads of state are held accountable for their participation in the U.S. financial system.

For Release on Delivery  
10:00 a.m. EST  
December 9, 1993

Statement of

J. Virgil Mattingly

General Counsel

Board of Governors of the Federal Reserve System

before the

Committee on Banking, Finance and Urban Affairs

House of Representatives

December 9, 1993

Mr. Chairman, I am pleased to appear today to testify in connection with the Committee's hearing into recent requests that Sheikh Zayed al-Nahyan and two of his adult sons be granted head of state immunity in connection with pending civil litigation. The litigation relates to the acquisition of the First American banking organization by the Bank of Credit and Commerce International, S.A. and its affiliates (collectively "BCCI"). Sheikh Zayed is the President of the United Arab Emirates and the ruler of Abu Dhabi, one of the emirates that make up the UAE.

**Federal Reserve Enforcement Actions Related to BCCI**

At the outset, you have asked me to summarize briefly the BCCI matter and the Board's enforcement actions relating to BCCI. The irregular and unlawful operations of BCCI have been described in detail at prior hearings before this and other Congressional committees. In brief, prior to its closing in July 1991, BCCI operated banking offices in numerous countries throughout the world, but was not subject to supervision as a consolidated organization in its home country. This lack of consolidated supervision facilitated BCCI's ability to carry out fraudulent transactions by, for example, allowing the manipulation of accounts through transfers of funds among its affiliates.

Much evidence has now come to light disclosing a complex and massive fraud at BCCI, including mismanagement, substantial loan and treasury account losses, misappropriation of funds, unrecorded deposits, the creation and manipulation of

fictitious accounts to conceal bank losses, and concealment from regulatory authorities of BCCI's true financial position. BCCI never received regulatory approval to accept deposits from the general public in this country, although it did operate several agencies here. However, evidence uncovered as a result of formal investigations by the Federal Reserve and other authorities shows that BCCI did engage in this country in a scheme to acquire controlling interests in U.S. banking organizations without the required prior regulatory approval. BCCI carried out this scheme by causing individuals financed by BCCI to acquire voting shares of banking organizations as the nominees of BCCI. As a result of this scheme, BCCI acquired controlling interests in Credit and Commerce American Holdings, N.V. ("CCAH"), the holding company established to acquire the First American banks, which operated in Virginia, Maryland, Washington, D.C., New York, and Tennessee, as well as the Independence Bank in California and the National Bank of Georgia.

A series of administrative enforcement actions by the Federal Reserve Board have grown out of BCCI's unlawful acquisition of banking organizations in this country. First, the Board instituted actions against BCCI itself and related individuals arising out of the First American and National Bank of Georgia transactions. The Board's charges were resolved as part of a comprehensive plea agreement that also resolved parallel criminal prosecutions against BCCI brought by the Justice Department and the New York County District Attorney.

BCCI pled guilty to the criminal charges and BCCI's U.S. assets, estimated at several hundreds of millions of dollars, were forfeited to the United States. Under the agreement, half of the forfeited assets would then be paid to a worldwide victims' fund to compensate innocent depositors. BCCI also consented to the Board's \$200 million civil money penalty, with the Board agreeing to stay collection of the penalty in light of the asset forfeiture. The plea agreement also incorporated a requirement that BCCI's interest in the First American banks would be fully divested, which has now been accomplished, and that the proceeds from the sale of that interest would be forfeited as an asset of BCCI under the agreement.

Federal Reserve enforcement actions were also aimed at various individuals who served as BCCI's senior management or as nominees of BCCI in acquiring and retaining control of U.S. banking organizations. These individuals include Kamal Adham, a Saudi Arabian businessman who was charged with acquiring and holding shares of First American's holding company as a nominee for BCCI. Adham has paid a \$10 million civil money penalty as well as \$3 million in reimbursement to cover investigative costs. He has also been permanently barred from banking in the United States.

The second major BCCI-related enforcement action by the Federal Reserve involves Ghaith Pharaon, another Saudi businessman. This action seeks a civil money penalty of \$37 million and an order prohibiting Pharaon from the banking

industry, primarily for his alleged participation in BCCI's unlawful acquisition of the Independence Bank. The Board's proceedings against Pharaon are pending. To assure that any possible civil money penalty assessed by the Board can be collected, the Board has obtained a federal district court order freezing Pharaon's assets in this country until completion of the administrative proceedings before the Board. Pharaon is also facing three federal indictments and an indictment in New York County.

Of the other individuals charged in this and the First American proceedings, five are now subject to Board orders assessing penalties or banning them from banking, including Agha Hasan Abedi, the founder and president of BCCI, and Swaleh Naqvi, a principal officer of the organization. Actions seeking to impose similar sanctions against three other individuals are pending.

A third major enforcement action brought by the Federal Reserve involves Clark Clifford and Robert Altman, who, among other things, served as counsel for BCCI and CCAH and as senior management of the First American organization. The Board's case has been stayed pending a final decision on whether federal criminal charges against these individuals will be reinstated.

The fourth major BCCI-related action is against Khalid bin Mahfouz, a Saudi banker, and the bank his family owns in Saudi Arabia, who are charged with unlawfully acquiring and holding a 28 percent block of shares of First American's holding

company from 1986 through at least 1990 without regulatory approval. The Board's action seeks a \$170 million civil money penalty from Mahfouz. As a result of a federal court asset freeze lawsuit, letters of credit, totaling \$122 million, have been provided to the Board in connection with the civil penalty proceeding. Mahfouz has also been indicted in the County of New York.

**Involvement of the Ruling Family of Abu Dhabi with BCCI**

The Abu Dhabi ruling family had substantial ownership interests in both BCCI and the First American organization. After the Board's August 1981 approval of the acquisition of the First American banks by CCAH, Sheikh Zayed and his oldest son, Khalifa, became substantial investors in CCAH, each holding about 10 percent of its voting shares. Since the formation of CCAH, the Abu Dhabi Investment Authority ("ADIA") has separately owned between 6 and 8 percent of voting shares of that company.

At this time, none of the Federal Reserve's pending enforcement actions names the Abu Dhabi ruling family or ADIA; nor in any of the actions brought by the Federal Reserve against others has the Abu Dhabi ruling family or ADIA been alleged to have served as BCCI nominees in controlling the shares of First American's holding company.

The Federal Reserve has not, however, had access to all of the evidence relating to the ownership of CCAH shares by members of the Abu Dhabi ruling family and related interests and has requests outstanding for access to witnesses and documents in

Abu Dhabi. We are continuing to pursue all relevant information relating to the ownership of shares of CCAH.

**Requests for Head of State Immunity by  
Sheikh Zayed and His Sons**

Sheikh Zayed and his sons have moved to be dismissed as defendants in a civil lawsuit brought against them and a number of other BCCI-related individuals by the First American organization. The lawsuit, filed in federal district court in Washington, D.C., seeks, among other things, damages for injuries to the organization resulting from its unlawful acquisition by BCCI. As we understand it, Sheikh Zayed asserts that, under the doctrine of head of state immunity, he, as the head of state of the UAE, and his immediate family are not subject to lawsuits in this country. We understand that the State Department has been requested to express a view on whether head of state immunity applies to Sheikh Zayed and his sons.

Thus, the specific question as to whether head of state immunity requires the dismissal of Sheikh Zayed and his sons as defendants in the pending civil suit is now before the federal district court and the Department of State, which traditionally speaks for the Executive Branch on questions of immunity for foreign rulers. The Board is not a party to the civil litigation and has not taken a position on the head of state immunity issue. The staff of the State Department has solicited the views of the Board's staff on the possible effects on the Board's bank regulatory powers if this immunity request were granted.

**Effect of Granting Immunity to the  
Abu Dhabi Ruling Family**

If, as a result of the Board's ongoing investigation into BCCI matters, a formal enforcement action were to be taken against the ruler of Abu Dhabi, it is very possible that the Board's ability to prosecute such an action could be impaired if immunity were granted. As we understand it, the scope of head of state immunity has not been precisely defined, but it is possible that such immunity could be interpreted as affording complete protection against any type of civil action in this country, including a regulatory enforcement proceeding. Moreover, it is not clear whether the grant of head of state immunity to the ruler would cover his adult sons. We are not aware of any situation in the past where a bank regulatory agency sought to take formal enforcement action against a foreign head of state.

**Impact of Immunity Grant on Regulation of  
Foreign Government Owned Banks**

With regard to the more general question, a grant of immunity to a head of state who owns or controls a banking organization operating in this country could restrict the Board's ability to assure compliance with the banking laws. As explained earlier, in such a case the grant of head of state immunity could be interpreted as barring the Board from taking any enforcement action against a head of state who was a principal shareholder of the organization. In addition, because of this potential limitation on the exercise of an important regulatory tool, the issue of head of state immunity would be a significant factor in

any application by a head of state to acquire a U.S. bank, unless there were an effective waiver of immunity by the head of state.

Based on a review of available data, we are unaware of any instance in which a person who can be identified as a head of state, or as a member of the household of a head of state, at the present time owns five percent or more of the shares of a bank with operations in the United States. However, in shareholder lists required to be filed with the Federal Reserve we do not request that a head of state be identified as such, so that we cannot say for certain that no head of state currently owns shares of a bank doing business here.

As this Committee is aware, there are a number of banking organizations operating in this country that are owned by foreign government entities. The scope of the immunity granted to a foreign government entity in a civil action is governed by the Foreign Sovereign Immunities Act. That Act does not extend immunity to commercial activity by a foreign state entity in this country, which we believe should include the acquisition and control of U.S. banks or the conduct by a foreign bank of activities in this country. Accordingly, under this view of the FSIA, we believe that a defense of sovereign immunity should not interfere with the effective regulation of the operations of foreign government owned banks in this country in the future. In this regard, the defense of sovereign immunity has not been raised in any of the enforcement actions taken to date by the Board against foreign government owned banks.

**Conclusion**

Although questions as to the existence and scope of immunity for the heads of foreign states or foreign government entities are determined by authorities other than the Federal Reserve, a grant of head of state immunity to an individual controlling a banking organization with operations in the U.S. could possibly block regulatory actions against the head of state to enforce the banking laws. However, we are not aware of any situation in the past where immunity has restricted the exercise of regulatory powers over foreign government owned banking organizations, and possible problems related to immunity for foreign heads of state might be dealt with in the future by requiring a waiver of such immunity as a condition for approval.

Supplemental Material for House Banking  
Committee Hearing Transcript

Question: Why has Ghaith Pharaon not been extradited to the  
United States?

Answer: Ghaith Pharaon is a citizen of Saudi Arabia. The United States has no extradition treaty with Saudi Arabia. Any further questions about efforts to extradite Pharaon should be addressed to the Department of Justice.

December 9, 1993

STATEMENT OF HARRY W. ALBRIGHT JR.

Mr. Chairman and members of the House Banking Committee:

1. Introduction

My name is Harry W. Albright Jr. I greatly appreciate your invitation and the opportunity to appear before you today.

On June 23, 1992, I became Trustee of First American Corporation by the Order of Judge Joyce Hens Green of the United States District Court for the District of Columbia, at the request of the Board of Governors of the Federal Reserve System, the Department of Justice, the District Attorney of New York and the BCCI Liquidators. A principal purpose of the Court Order is to sever the illegal ownership by BCCI of First American Bank by a forced sale of its assets -- principally its wholly owned banks. That sale is to be accomplished by me as sole Trustee with exclusive control over the shares of stock of the First American Corporation.

I should note that I came to this position with prior banking and regulatory experience. That experience includes service as Superintendent of Banks of the State of New York, as Special Counsel to Vice President Rockefeller in 1975, and as President and later Chairman and Chief Executive Officer of The Dime Savings Bank of New York.

Before I respond to the specific questions this Committee addressed to me for this hearing, I should like to publicly express my appreciation to you, Mr. Chairman, for your extraordinary and forthright response to my letter of November 17, 1993. In

that letter, as you know, I informed you of the request of Sheikh Zayed and his family that the United States Department of State suggest to the District Court the grant of a complete head of state immunity from the jurisdiction of our courts.

In this connection, Mr. Chairman, contemporaneously with your supportive letter to the State Department and that of Senator Kerry, I and First American representatives met with the Legal Advisor to the Department of State, Conrad Harper, and received a gracious and mutually informative hearing on November 18, 1993. Based on that meeting, I have cause to hope that the disastrous precedent of a grant of immunity under these circumstances is now more fully appreciated, and that our views on this matter are being seriously considered. There is no assurance, however, that our views will be adopted by the State Department.

I must mention, Mr. Chairman, that as a former bank regulator and banker, I have observed with considerable admiration, your singular leadership in the Congress in warning of the potential adverse influences on the integrity of our financial and banking system of foreign entities operating beyond the laws and reasonable regulatory oversight. No one is better aware than you or this Committee of the effect of events here and abroad on an interdependent financial system increasingly driven by modern communications, including instant electronic transfer of funds.

On a personal basis, almost 20 years ago, while I was serving as Superintendent of Banks in New York under then-Governor Nelson Rockefeller, there occurred a collapse of the Franklin National Bank, a federally chartered institution which ultimately was taken over by a New York chartered registered holding company. This was the first major bank collapse in the United States since the Great Depression

in the 1930s. Withdrawals from the \$6 billion Franklin, when it first became known that it was in trouble, took place over a period of weeks and months, leading to its ultimate demise. Today, with instant electronic funds transfer, that collapse would have taken place within hours. Thus, as a former bank regulator and banker, I fervently support any efforts here and abroad to improve the quality of analysis, regulation and administration that can lead to renewed confidence in the international banking system.

As Trustee, I certainly deplore any possibility of a "cover up" of what really occurred in BCCI's control of First American. I am sure you also know better than anyone that there are persons who proclaim a state of high fatigue on the BCCI issue and wish the whole matter would go away. There continues to be promoted the view that the United States has no interest at stake in pursuing this matter any further. But for our own national public interest, nothing could be more wrong than to heed those who would seek to put this matter behind us without the true facts becoming fully known.

The manipulation of information available about what really happened in BCCI's takeover of First American has allowed a number of myths to flourish about BCCI that need to be dispelled. First, there is the myth that no one in the United States has been injured or "lost a penny" as a result of the BCCI collapse. Second, that BCCI's illegal ownership and influence over the management of First American caused no injury to anyone. Third, that First American was brought to the brink of failure because it had bad real estate loans. Finally, that Sheikh Zayed was duped and a victim along with everyone else, and has no civil liability.

These myths are not supported by the facts:

- (1) First American was severely damaged by the BCCI scandal and its value was impaired. Almost \$1 billion in deposits flew out of First American banks in 1991 as a result of the BCCI matter, and First American was saddled with money-draining operations in Georgia and New York as a result of BCCI's control.
- (2) Approximately 1,500 First American employees lost their jobs.
- (3) The FDIC claims it incurred a \$100 million loss when it had to pay off holders of deposits in Independence Bank, a California bank claimed to be controlled by BCCI.
- (4) Millions of dollars of expenses and untold administrative burdens were imposed on the Federal Reserve, other federal and state bank regulatory agencies, and federal and state law enforcement officials.
- (5) Sheikh Zayed and others were not duped but were knowing participants. They were not victims of the scandal, but perpetrators.
- (6) The American public has a right to know the true facts involved in the world's greatest banking scandal.

- (7) The true facts will deter future threats to the safety and soundness of this nation's banking system and the international banking system on which it is so dependent.

What makes the BCCI matter so very difficult to comprehend and frustrating to the public, Mr. Chairman, is that given the nature of the BCCI affair, the process of investigation is time consuming and costly and the explanations derived are unduly complex and burdensome. The BCCI investigation has certainly not been made easier

by the fact that Sheikh Zayed's agents packed a 747 airplane with most of the critical files from BCCI's London office and took them to Abu Dhabi, where they have remained inaccessible to all United States law enforcement authorities, including the Federal Reserve. Nor by the fact that the Abu Dhabis detained in the United Arab Emirates eighteen of BCCI's top managers, without charges, for two years and have refused to permit access by United States and British law enforcement authorities. It may be no coincidence that criminal charges against ten of these detained BCCI employees were filed only three weeks after First American alleged in its civil action that the Abu Dhabi defendants were obstructing justice through the detention of these witnesses. It is not clear whether this government detention of former BCCI employees was originally involuntary or simply a collusive effort to avoid law enforcement. If involuntary, this lengthy detention without charges not only interfered with United States law enforcement but clearly violated the basic human rights of the individuals detained.

Yet, while withholding from scrutiny these critical documents and witnesses, Sheikh Zayed made application to the District Court seeking immediate repayment of approximately \$270 million in debts allegedly owed him and others by First American. While this application was denominated an attempt to "clarify" the Court's previous order appointing me as Trustee, the fact is he sought affirmative relief from the Court. It beggars the imagination that while the Sheikh possibly violates basic human rights and arbitrarily rejects the legal and regulatory authority of the United States, he has the temerity to seek a remedy from the very federal court he now attempts to deny jurisdiction through the device of head of state immunity.

2. The Background of My Appointment and My Role

Turning to the questions put to me for this hearing, I was appointed to my current position as Court-appointed Trustee in a RICO forfeiture proceeding -- brought by the United States -- arising, in part, from the unlawful acquisition of First American by BCCI. This proceeding resulted in a plea agreement entered by the BCCI Liquidators in which BCCI admitted unlawful ownership of First American through a pattern of racketeering and forfeited its ownership interest to the United States. As part of the plea agreement, the United States has agreed with the BCCI liquidators that it will retain half of the proceeds realized from the forfeiture of BCCI's interest in First American and pay the other half to the World Wide Victims Fund.

The Victims Fund represents the thousands of depositors and creditors defrauded by those who operated and conspired with BCCI. It is important to remember that many of these victims have not yet received a penny of compensation for their lost bank deposits. One can only imagine the public outcry that would occur in the United States if, after several years, depositors had not received the return of their deposits in a bankrupt bank.

My principal role as Court-appointed Trustee is to realize the best price obtainable from the sale of First American banks and liquidation of its assets. To that end, I have vigorously pursued and recently achieved prompt and successful sales of First American's subsidiary banks for more than \$450 million, although the liquidation process still continues. As noted earlier, as a result of the forfeiture and plea agreement, the United States and the World Wide Victims Fund will share in the proceeds of these sales.

3. The Civil Action Against Sheikh Zayed and Others.

In addition, I have supported the very important civil action brought by the First American Corporation and First American Bankshares Inc., to remedy the damage done to these corporations by those involved with BCCI's illegal acquisition and control of First American. It is that civil action that has given rise to the events precipitating this hearing.

On the 25th day of June, 1993, two days after the successful Court-approved sale of the principal First American banks, these two corporations, as authorized by their Boards of Directors, with my full endorsement, filed the civil action in the United States District Court for the District of Columbia. At that time, I stated that I would make no further public comments regarding that action while it was before the Court (except now, of course, I must do so in response to your Congressional inquiry). But I would like to repeat what I stated then: "The corporation's vigorous pursuit of this action provides the best chance that the true facts of the complex and mysterious takeover and control of First American will come to light -- in the American tradition, before an American court. Absent this cause of action, this matter could conceivably be closed without anyone ever knowing the full extent of the conspiratorial actions in the United States, or the nefarious and corrupt banking practices involved."

This lawsuit is of great importance to the liquidation of First American. At least \$500 million -- and probably substantially more -- in damages was suffered by First American as a result of its illegal acquisition and manipulation by BCCI and the defendants in this action. Trebled, these damages will amount to more than \$1.5 billion. Thus, this suit can repair the damage to the United States and provide

enormous benefits for the victims of BCCI around the world. But this lawsuit also serves an additional purpose of great importance to the public interest: it assures that the truth as to the participants in the BCCI scandal is brought to light in the crucible of civil litigation.

This pending civil action charges Sheikh Zayed, President of the United Arab Emirates, certain of his sons and Abu Dhabi associates, and others with very direct complicity in the illegal acquisition and control of First American. First American contends that Agha Hasan Abedi, the Chairman of BCCI, did not act alone, but acted together with Sheikh Zayed and as Sheikh Zayed's trusted agent, in unlawfully acquiring First American and directing certain of its business activities.

As detailed in First American's complaint -- as well as the Report filed by Senators John Kerry and Hank Brown to the Committee on Foreign Relations -- Sheikh Zayed, among other things, allowed his vast financial resources to be used to capitalize the growth of BCCI and, through his agents, was involved in the operation of BCCI from its origin to the time of its regulatory seizure. In particular, for example, it is alleged that Sheikh Zayed approved the acquisition of First American's predecessor, Financial General Bankshares, by BCCI, he personally approved the use of his sons' names as shareholders, and he provided funds, through a special account held by a BCCI affiliate, that were used by BCCI to purchase control of First American not only in his own name but in the names of BCCI front-men. These front-men included the leaders of other emirates in the United Arab Emirates, who are subject to Sheikh Zayed's controlling influence. They also included a high ranking Abu Dhabi official serving directly under Sheikh Zayed, who has actually defended his conduct in court

on the ground that his role as a nominal First American shareholder was required as part of his official duties. In sum, the role of the Ruling Family of Abu Dhabi in these commercial activities was incontrovertibly central.

4. Sheikh Zayed's Efforts to Obtain Immunity through the State Department

Rather than answer First American's claims on the merits, Sheikh Zayed has attempted to avoid adjudication on the merits by applying diplomatic and political pressure on the State Department for a grant of head of state immunity. This is only the latest of a consistent pattern of efforts by the Abu Dhabi defendants to prevent investigation of their role in the BCCI scandal. As noted earlier, when it became clear that regulatory scrutiny of BCCI was intensifying in August of 1990, Abu Dhabi's agents packed a 747 airplane with critical files from BCCI's London office and brought them to Abu Dhabi, where they have remained inaccessible to law enforcement authorities. After BCCI was seized by regulators on July 5, 1991, a number of key BCCI employees, including Mr. Abedi's second in command, Swaleh Naqvi, have been held in government custody in Abu Dhabi beyond the reach of U.S. and British law enforcement authorities.

To avoid litigation -- or even extensive inquiry -- by the liquidators of BCCI, Abu Dhabi made a quick settlement agreement with the BCCI liquidators in 1992, at a time before its role was investigated or known. As part of this settlement, Abu Dhabi agreed to pay about \$1.7 billion, provided that in return, it received general releases from liability for Sheikh Zayed and a large number of Emirate-related parties, and provision was made to prevent the dissemination of information that would disclose Abu Dhabi's role in BCCI. Many believe that the serious questions raised by First

American's lawsuit, which I personally brought to the attention of the Luxembourg Court of Appeal, played an important role in persuading the Luxembourg Court to refuse to approve the settlement agreement. With the rejection of this agreement, the prospects for successful litigation against the Abu Dhabi Ruling Family by the liquidators and creditors of BCCI have dramatically increased. A grant of head of state immunity would, accordingly, not only seriously impact the First American civil action but could bear upon litigation brought by others.

5. Reasons Why the State Department Should Not Support Immunity

There is no conceivable reason -- apart, of course, from diplomatic and political pressures -- for the United States Department of State to lend its support to the efforts of the Abu Dhabi defendants to obtain immunity and avoid answering for their participation in BCCI's misconduct. Such support is clearly not dictated by existing precedent on head of state immunity, however nebulous that doctrine may be. I will not discuss the legal aspects of that doctrine in detail here, since those issues are discussed in the memoranda that have been submitted to the State Department by counsel for First American and by Professor Lowenfeld, copies of which have been provided to the Committee by Senator Mathias.

As these memoranda make clear, the State Department has never adopted the theory of absolute immunity which Sheikh Zayed seeks. Neither the State Department, nor any U.S. court, has ever before endorsed immunity for private commercial activity affecting the United States -- such as the investment and banking activity at issue here -- when conducted by a head of state.

Moreover, in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), the Congress adopted a policy of restrictive immunity for suits against foreign states themselves, consistent with the clear trend of modern international law. Under the restrictive theory embodied in the FSIA, commercial activity conducted by a sovereign is not immunized but subjected to the same law governing any private participant in U.S. commerce. There is no persuasive policy reason for failing to apply the commercial activities exception to any head of state doctrine; there is simply no reason for granting a head of state greater immunity than the state itself would enjoy under United States law.

There is another reason why immunity would be especially inappropriate here: the Abu Dhabi defendants are seeking the assistance of the same United States District Court in collecting large debt obligations (in excess of \$220 million) allegedly owed them and others by First American at the same time Sheikh Zayed is seeking immunity from First American's claims. It defies fundamental justice to permit one party to resort to the courts and, at the same time, prevent the other party from seeking relief for wrongs done to it. In the words of the Supreme Court, these defendants "want[] our law, like any other litigant, but [they] want[] our law free from the claims of justice." See National City Bank v. Republic of China, 348 U.S. 356, 361-62 (1955). An extension of immunity in this case is contrary to basic "considerations of fair dealing." Id. at 365.

In summary, it is inconceivable for the United States to endorse a principle that would immunize the unlawful investment of billions of dollars in regulated U.S. businesses and free the participants from any restraints of U.S. law.

6. Adverse Effect on Safety and Soundness

Finally, as a former bank regulator, I find particularly wrong the claim that illegal participation in regulated banking activity in the United States by a head of state is immune from the reach of U.S. law. The absolute immunity doctrine asserted by the Abu Dhabi defendants would preclude not only civil actions brought against them by the financial institution itself, but could also bar civil or criminal enforcement actions brought by state and federal government authorities for violation of our banking laws.

Moreover, a grant of immunity here would invite investment in and reckless manipulation of United States banking organizations by other foreign rulers -- a clear danger to the safety and soundness of our banking system. The threat to valuable American banking franchises is more than a theoretical problem. A recent survey indicated that of the 25 richest people in the world, six are members of ruling families, controlling many billions of dollars. Alison Rodgers, The Billionaires: The World's 101 Richest People, Fortune, June 28, 1993 at 44-46.

The historical background and genesis of First American illustrates the vulnerability of a uniquely valuable banking franchise to foreign influences operating beyond regulatory oversight. Such vulnerability will be greatly expanded if foreign rulers who invest in our banking institutions can escape civil liability for commercial transactions under a precedent of head of state immunity.

Banking historians and those more senior members of the Congress will recall the existence of the Morris Plan. First American's predecessor was the original Morris Plan bank. A cross between a thrift for small savers, a consumer loan company and a full fledged commercial bank, this Morris Plan bank operated under a unique multi-

state charter in the mid-Atlantic states. As banking law changed, its charter became extremely valuable. Its successors, Financial General Bankshares and then First American, building on this foundation, had a unique niche in the metropolitan Washington markets. Approximately one out of every three households in the Washington DC metropolitan area had a banking relationship with First American. At one time it had assets of approximately \$12 billion and, until disclosure of BCCI illegal ownership, it operated profitably in a confederation of highly successful banks and holding companies.

It is this bank, when still known as Financial General Bankshares, that BCCI, funded largely by Sheikh Zayed and with his knowledge, sought to acquire in 1978. After a protracted litigation, Financial General was successfully acquired by "Middle Eastern investors," including Sheikh Zayed, represented by Clark Clifford and Robert Altman. Regulatory approval was granted (opposed only by Virginia Commissioner Sidney Bailey) only after assurances were given that there would be a complete separation between the management of Financial General (now First American) and BCCI, whose role would be limited to that of a "financial advisor" to the shareholders.

We now know that those assurances were completely false and that First American was owned in substantial part by BCCI. Moreover, BCCI, acting through Messrs. Clifford and Altman, caused First American to undertake certain corporate actions which were secretly intended to benefit BCCI rather than First American. For example, BCCI caused First American to acquire a bank in New York City and to enter into a long-term lease on Park Avenue for space far in excess of what was needed for the operations of the New York subsidiary. First American was not informed that BCCI

intended to use this space as the future headquarters of a merged BCCI/First American. The excess costs of the New York lease caused a substantial drain on First American assets over the past ten years, a drain that continues today.

Similarly, BCCI caused First American's parent holding company to enter into an agreement to purchase the National Bank of Georgia from Ghaith Pharaon, a BCCI nominee, in order to reduce BCCI's exposure to Pharaon at a time when BCCI's auditors apparently were making inquiries about that relationship. First American was never informed of BCCI's interest in the transaction or its role in the negotiation of the price. The Georgia transaction, like the New York lease, had an enormous adverse impact on the profitability of the First American banks.

The problems caused by these BCCI-imposed decisions were greatly exacerbated when the revelation of the BCCI connection caused a run on the bank in 1991. The First American banks lost almost \$1 billion in deposits within weeks, which nearly caused the failure of First American.

#### 7. Conclusion

For the foregoing reasons, I believe that a grant of head of state immunity to Sheikh Zayed under all of these circumstances would (1) significantly undercut my responsibilities as Court-appointed Trustee by substantially reducing the net proceeds available for forfeiture from the liquidation of First American's assets, (2) enable a wrongdoer to have access to our courts while denying such access to the wronged, (3) further a cover-up and eliminate the last best chance to finally reveal the truth in the world's most notorious banking scandal, and (4) establish a dangerous precedent to the safety and soundness of the banking system and other regulated businesses.

Statement of Charles McC. Mathias  
Before the Banking, Finance  
and Urban Affairs Committee of the  
United States House of Representatives

December 9, 1993

I. INTRODUCTION

Mr. Chairman, Members of the House Banking Committee, my name is Charles Mathias. Since November of last year I have served as Chairman of the Board of Directors of First American Corporation and First American Bankshares, Inc. It is in this capacity that I appear before the Committee today.

I appear here today at your invitation and welcome this opportunity to comment on the request for head of state immunity by Sheikh Zayed bin Sultan al-Nahyan and his associates in connection with the civil claims filed by First American. These claims raise serious charges of direct involvement by the Emir of Abu Dhabi, his sons and close associates in the illegal acquisition of First American by BCCI. First American contends that the Emir capitalized BCCI, he authorized the acquisition of First American by BCCI, he authorized the use of his sons' names for this acquisition, and he provided the funds that were used by BCCI to purchase First American equity in the names of cooperating front-men, including several individuals with close connections to the Emir. As detailed in First American's extensive Complaint, numerous criminal laws, regulatory requirements and common law duties were repeatedly violated. First American was greatly damaged -- and indeed nearly failed -- as a result of this illegal acquisition and certain consequent business transactions

dictated to First American by the Emir's trusted agent, Agha Hasan Abedi, the Chairman of BCCI.

The Emir has asked the United States District Court to dismiss him and his sons from First American's lawsuit on the grounds that, as a head of state, he and his family have absolute immunity from judicial law enforcement authority, and he has asked the United States to enter this action to support his claim. Rather than discuss the legal arguments that he has advanced, I would like, with your permission, to submit for the record two memoranda concerning the legal authorities that have been previously submitted by First American to the Department of State. The first is an opinion prepared at First American's request by Prof. Andreas Lowenfeld of New York University. Prof. Lowenfeld was the principal drafter of provisions relating to state immunity in the Restatement (Third) of Foreign Relations. The second memorandum was prepared by Jones Day, counsel for First American, and discusses more fully the legal arguments and judicial proceedings at issue in this case. Herb Hansell of Jones, Day, who served as Legal Adviser to the Department of State during the Carter Administration, is with me today to respond to any questions concerning the legal authorities you may have. As these memoranda make clear, Congress established in the Foreign Sovereign Immunities Act that the immunity of foreign states themselves does not extend to commercial activities, such as the investment and banking activities at issue here, and there is no reason to treat heads of state any differently. Neither the Congress, the State Department, nor the U.S. courts have adopted the theory of absolute, unqualified head of state immunity on which the Emir relies.

## II. GENERAL CONSIDERATIONS

I will not attempt to restate the legal arguments set forth in these memoranda but will limit myself to several broader observations. Every modern nation has .. determined that some of its economic and industrial activities are so vital to its welfare that they must be specially supervised and regulated. By way of illustration, such activities include the manufacture of pharmaceuticals, the operation of nuclear facilities and banking.

The Emir of Abu Dhabi has claimed that, as a head of state, he and his family are absolutely immune from the reach of U.S. law, civil or criminal, even with respect to private, commercial activity. The demand of the Emir of Abu Dhabi for absolute immunity in the United States is, in effect, a demand to be exempted from the supervision and regulation imposed on banking activities under U.S. law, and exempted from legal responsibility for conduct that is damaging to the U.S. banking system. This is a novel idea and one that would make a mockery of the system designed to protect the public.

It would be foolish to suggest that the FDA should close its files on a drug company just because it happened to be purchased by a foreign head of state. It is unimaginable that supervision and regulation of a nuclear activity would be precluded if it were acquired by a foreign sovereign. The dangers presented by banking may be of a different character than those inherent in drugs and nuclear activities, but are no less real and threatening to public welfare. It is wrong to claim that a foreign head of state can enter the United States, acquire a dominant interest in a major bank and at

the same time be exempted from regulation and free from legal responsibility by reason solely of his status.

### III. THE CIRCUMSTANCES OF ABU DHABI'S ENTRY INTO AMERICAN BANKING

The acquisition by the Emir of Abu Dhabi of a major interest in First American Bankshares was not a casual adventure on his part that should be overlooked because of lack of knowledge, information or experience with U.S. regulatory authorities. On the contrary, the Emir and his agents had been precisely educated on this subject. Their first attempt to acquire First American, then known as Financial General, had involved the use, as shareholders, of two of the Emir's sons, with the authorization of the Emir, in an effort to evade S.E.C. disclosure requirements. This effort failed; and the S.E.C. brought an enforcement action resulting in a consent degree against the Emir's sons. Under the theory advanced by the Emir, the S.E.C.'s enforcement action could also have been defeated by an assertion of immunity.

The initial attempt to acquire Financial General also involved an application to the Federal Reserve that was not approved because the acquisition had been rejected by state bank regulators. In this process the role and authority of the bank regulators must clearly have been made known to the Emir and his agents. The second successful attempt at acquisition certainly implies acceptance by the applicants of regulatory power and authority, and acceptance of the legal responsibility which attends acquisition of a U.S. financial institution. If that is not the case, then the time to demand immunity was at the time of application for approval of the acquisition; not a decade later.

Of course, if immunity from U.S. law had been demanded at the time of seeking the Federal Reserve approval of the purchase, it is not difficult to guess what the result would have been. The same considerations that would have been applicable then still apply today.

#### **IV. THE IMPACT OF SOVEREIGN IMMUNITY ON BCCI/FAB AND ON BANKING GENERALLY**

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One of the critical factors that has obstructed justice in resolving the related problems of BCCI and First American is the suppression of evidence by the Emir of Abu Dhabi. A vast archive of corporate records of BCCI was transported by jet aircraft to Abu Dhabi where it is maintained under lock and key. A dozen or more key officers of BCCI are being held incommunicado in Abu Dhabi. Government officials in Great Britain, Luxembourg and the United States, among others, have sought access to these records and witnesses without success. The only suggestion that it might some day be made available includes conditions that guarantee the Emir's continued monopoly of control of the evidence and the uses to which it may be put.

To recognize sovereign immunity under the existing circumstances would be to condone this suppression of evidence and the obstruction of justice. In addition, the facts are not clear with respect to the detention of potential witnesses. If they are being sheltered at their own request it is another part of the plot to suppress evidence. If on the other hand they were held against their will for almost two years without formal charges (which were filed with respect to some only last July), it may constitute not only an effort to suppress evidence but a serious human rights violation, as well. It is difficult to see how the defendants can expect serious consideration of their

demand of sovereign immunity in the absence of full and free access to evidence now being suppressed by the same sovereign.

There is, however, another matter of even greater importance in the long run. The dismal history of BCCI has portrayed in stark terms the cost to the global economic community of the absence of an adequate system of world-wide regulation of banks and other financial institutions. To grant immunity to certain highly privileged bankers would only retard the development of international regulation and perpetuate the black hole into which BCCI has fallen.

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MEMORANDUM

Introduction

I have been asked by Messrs. Jones, Day, Reavis & Pogue, counsel for plaintiff First American Corporation in an action presently pending in the U.S. District Court for the District of Columbia, for my opinion on the scope of so-called "head of state" immunity asserted by several defendants in that action. In particular, as I understand it, the action arises out of the concealed acquisition of controlling interest in First American or its predecessors by the Bank for Credit and Commerce International (BCCI), and alleged participation in the affairs of BCCI and First American by Sheikh Zayed bin Sultan al-Nahyan, as well as relatives and associates of Sheikh Zayed. Sheikh Zayed, I am informed, is the President of the United Arab Emirates, and in that capacity may be entitled to such immunity as is accorded to a head of state. Sheikh Zayed is also the ruler of Abu Dhabi, one of the constituent emirates of the UAE, and two of the other defendants are rulers of other constituent emirates of the UAE.<sup>1</sup>

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<sup>1</sup> I do not believe that rulers of subordinate units of a federal state such as the United Arab Emirates qualify as heads of state for the purpose of a head of state defense, but that question is not addressed in the present memorandum.

The issue on which I have been asked to give my opinion is whether head of state immunity extends or should be extended to activity of a commercial character carried out by or in behalf of a head of state. After giving a brief history and definition of head-of-state immunity in Part I, I discuss the relevant sources in Part II. On the basis that the question has not been conclusively resolved in governing precedents, I present my own opinion in Part III.<sup>2</sup>

Qualifications

I am the Charles L. Denison Professor of Law at the New York University Law School where I have been a Professor since the Fall of 1967. Prior to becoming a Professor of Law I was engaged for four years in the private practice of law in the City of New York, and served for five years in the Office of Legal Adviser in the United States Department of State, holding the position of Deputy Legal Adviser at the time I left government service. I am a member of the bar of the State of New York and of the United States Supreme Court, as well as of the U.S. District Courts for the

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<sup>2</sup> I do not here discuss the definition of "commercial activity." It may be of interest in connection with the present action, however, that the Draft Articles of Jurisdictional Immunities of States and their Property prepared by the International Law Commission, contain, in Part III, "Exceptions to State Immunity," in addition to the basic article on commercial contracts (Art. 12), a special provision (Art. 18) on participation in companies or other collective bodies incorporated or constituted under the law of the State of the forum. The accompanying commentary makes clear that the exception to immunity therein is based on considerations similar to those relating to commercial contracts, which are directly traceable to the consent of the State to participate in companies formed and functioning in another state. See 1986 Yearbook of Int'l Law Comm. Vol. II, pp. 26, 28 (UN 1988).

Southern and Eastern Districts of New York and the Courts of Appeals for the Second, Eleventh and District of Columbia Circuits. I am a graduate of Harvard College (M.c.L.) and of the Harvard Law School (M.c.L.).

My special fields are International Law, International Economic Transactions, Conflict of Laws, and International Litigation and Arbitration, and I have also taught and written in the fields of Aviation Law, Torts and Civil Procedure. I am a frequent participant in international conferences for legal scholars and practitioners, in the United States, in Europe, and in the Far East. I have been a Lecturer at the Hague Academy on International Law, and will be giving the General Course in Private International Law there next summer. I am a member of the Institut de Droit International, and of the Advisory Committee on Private International Law of the United States Department of State.

Since becoming a full-time member of the faculty of Law of New York University, I have served as special consultant to several law firms both in the United States and abroad, as expert witness before courts in the United States and various foreign countries, and as an arbitrator in numerous international controversies. I have served as consultant to the United States government as well as to several foreign governments, and as a member of a Disputes Panel under the General Agreement on Tariffs and Trade. I am author of ten books dealing generally with the subject of international transactions -- public and private. My six-volume series on International Economic Law is now in its second edition. My most

recent book is International Litigation and Arbitration (1992), and I am presently at work on a Treatise on International Economic Law to be published by the Oxford University Press.

I have published more than 100 articles and reviews in the Harvard, Columbia, Chicago, Michigan, Stanford, and New York University Law Reviews, the American Journal of International Law, the American Journal of Comparative Law, the Journal of Maritime Law and Commerce, and comparable professional journals in the United States and Europe. I served for eight years as Associate Reporter of the Restatement (Third) of the Foreign Relations Law of the United States (1987), with principal responsibility for Part IV, Jurisdiction and Judgments, and Part VIII, International Economic Law.

Of particular relevance to the present controversy, when I served in the State Department in the 1960s, I frequently presided over or participated in hearings involving applications to the Department for Suggestions of Sovereign Immunity, and I wrote what I believe was the first memorandum urging the State Department to withdraw from the practice of making such suggestions, and urging passage of a foreign sovereign immunity statute.<sup>3</sup>. That memorandum, in turn, led to a commission shortly after I left the State Department, to prepare a thorough study of a New Approach to Sovereign Immunity for the State Department, including a proposal

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<sup>3</sup> That memorandum, written in the fall of 1966, is reproduced (without attribution) in 1 A. Chayes, T. Ehrlich, and A. Lowenfeld, International Legal Process, pp. 150-53 (1968).

for legislation.<sup>4</sup> When the State and Justice Departments began their serious study of what became the Foreign Sovereign Immunities Act of 1976, I was an active member of the advisory committee, until I withdrew because I was representing a defendant making a claim of immunity that was arguably inconsistent with the thrust of the legislation being prepared.<sup>5</sup> Thus I cannot be said to be the "father" of the FSIA, but perhaps the "grandfather." I was also the principal drafter of §§ 451-63 of the Restatement (Third) of Foreign Relations Law concerning the immunity of states from jurisdiction, and a co-drafter of §§ 464-70, concerning immunity of diplomats and international organizations.

#### I. Sovereign Princes and the Development of Sovereign Immunity

When one thinks today of sovereign immunity, one thinks of the immunity of states. Thus the United States legislation of 1976 is called the Foreign Sovereign Immunities Act, whereas the British legislation two years later is called the State Immunity Act, though both deal essentially with the same subject -- assertion in domestic courts of claims against foreign states. In origin, the concept was the reverse. The sovereign -- king or prince or emperor or tsar, or even a duke -- was immune, because he was declared equal in stature to the sovereign in whose courts a claim

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<sup>4</sup> The study was later adapted for publication as a law review article, A. Lowenfeld, "Claims against Foreign States--A Proposal for Reform of United States Law," 44 N.Y.U. L. Rev. 901 (1969).

<sup>5</sup> See Aerotrade, Inc. v. Republic of Haiti, 376 F. Supp. 1281 (S.D. N.Y. 1974); the litigation is described in A. Lowenfeld, "Litigating a Sovereign Immunity Claim -- The Haiti Case," 49 N.Y.U. L. Rev. 377 (1974).

against him might be raised. *Par in parem non habet imperium.*<sup>6</sup>

Chief Justice Marshall, who seems to have been the first jurist to have thought through the issue of sovereign immunity,<sup>7</sup> put it somewhat differently in The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812). One would not expect a sovereign to enter the territory of another in peace time without the latter's consent, and that consent, or waiver of territorial jurisdiction, may be implied:

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise

<sup>6</sup> Many courts and writers have stressed this point. See, e.g., the leading modern American case on sovereign immunity prior to adoption of the FSIA, Victory Transport Inc. v. Comisaria General de Abastacimientos y Transportes 336 F.2d 354 at 357 (2d Cir. 1964):

The doctrine originated in an era of personal sovereignty, when kings theoretically could do no wrong and when the exercise of authority by one sovereign over another indicated hostility or superiority.

<sup>7</sup> Interestingly enough, the founders of modern international law, such as Grotius and Vattel, did not address the subject, or spoke only about immunity of ambassadors.

of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

11 U.S. at 137.

Marshall described three classes of cases in which the territorial state (i.e., the proposed forum) would be deemed to have waived its jurisdiction, thereby rendering the foreign sovereign immune:

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained. The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case.

11 U.S. at 137-38.

This principle, which we might call rule of personal immunity of the head of state when he travels to another country on affairs of state, is clearly still accepted today.

Marshall's second principle, immunity for diplomats, is also still accepted today:

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity

is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose Court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of exterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain -- privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

Id. at 138-39.<sup>8</sup>

Finally, Marshall contemplates other situations of consent and implied waiver of jurisdiction, i.e., grant of immunity:

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

Id. at 139.

This third principle finds its modern counterpart in bases

<sup>8</sup> Marshall goes on to speculate in what cases a minister, "by infracting the laws of the country in which he resides," may render himself amenable to the jurisdiction of the receiving state, on the ground that he has violated the conditions on which his immunity was granted. Compare the Vienna Convention on Diplomatic Immunities, Art. 31(1)(c), Art. 42.

agreements, Status of Forces treaties, and the like. Marshall goes on to explain why the permission to troops of a foreign prince to cross a state's territory may often be presumed, but why a comparable presumption does not apply generally to ships of war, but does supply to naval vessels, such as the Exchange, driven to port "by stress of weather or other urgent necessity." Id. at 141-143.

The Schooner Exchange case is of course regularly cited as the fountainhead of the absolute theory of immunity. Actually, Chief Justice Marshall leaves open the question of whether suit can be brought in respect of claims relating to the private property or activity of the foreign prince, suggesting that he might well not extend the implied waiver by the forum state of its jurisdiction to cover such suits:

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern.

Id. at 145.

It is fair to say that Marshall (i) viewed the immunity of foreign sovereigns as personal to the sovereign and his ministers or ambassadors, and (ii) anticipated, though there was no occasion for him to hold, the restrictive theory of immunity, applicable

precisely to those to whom immunity was granted, i.e., the sovereign himself.<sup>9</sup>

Not many courts -- none, so far as I know in the United States -- have addressed the question raised but not answered by Chief Justice Marshall, whether a foreign prince is amenable to suit for private commercial activity in the forum state. The case often cited as the leading case for personal immunity of the sovereign turns out on careful reading not to support such immunity.<sup>10</sup> In Charles Duke of Brunswick v. The King of Hanover, [1844] 6 Beav. 1, aff'd, 2 House of Lords Cas. 1 (1848), plaintiff, the former Duke of Brunswick, had been deposed by the Germanic Diet. Thereafter King William IV of the United Kingdom and Charles' brother William had signed an instrument appointing a guardian over Charles and his property. Charles brought suit in England against his brother William, who had in the mean time become King of Hanover, while remaining a British subject and a Peer of the Realm. William, King of Hanover, appeared in the action and raised two defenses: (i) that as an independent sovereign he was not liable to be sued in England -- i.e., an immunity defense; and (ii) that the matters complained of are not the subject of municipal jurisdiction, in that they are matters of state or political transactions -- i.e., what we would call an act of state defense.

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<sup>9</sup> Accord: Joseph W. Dellapenna, Suing Foreign Governments and their Corporations, p.3. (1988).

<sup>10</sup> Accord: Sir Ian Sinclair, "The Law of Sovereign Immunity: Recent Developments," 167 Recueil des Cours 113, 124 (Hague Acad. Int'l Law 1980-II).

The Lord Chancellor, Lord Cottenham, deliberately avoided answering the first question, since the second one was sufficient to dispose of the case:

The whole question seems to me to turn upon this...that a foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign.

That is the sole question; therefore I avoid the question which does not necessarily arise, -- how far a foreign Sovereign, coming into this country, is amenable at all. I do not enter upon that question, because it does not necessarily arise upon the proper disposal of the matter now before us, as I am of opinion that, upon the face of this bill, the allegations show that the acts could not have been done, and were not done in any private character, but that they were done, whether right or wrong, in the character of the Sovereign of a foreign state.

2 House of Lords Cas. at 17-18.<sup>11</sup>

One later English case did accord immunity to a foreign sovereign in respect of a private -- indeed very private transaction. In Mighell v. Sultan of Johore, [1894] 1 Q.B. 149, the Sultan had come to England incognito, and had lived in London under the name Albert Baker. In that role he began a relationship with

<sup>11</sup> Lord Brougham, *id.* at 23-24, likewise reserved his position on how the case would have come out if it had concerned a private transaction, such as a contract of sale or a mortgage; See also De Haber v. Queen of Portugal, [1851] 17 Q.B. 171 at 206-07, citing the Duke of Brunswick case for the proposition that "an action cannot be maintained in an English court against a foreign potentate for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head." (emphasis added).

the plaintiff, who subsequently sued him for breach of promise to marry. The Court first inquired from the Colonial Office whether the defendant was regarded as a sovereign, and when the Colonial Office answered in the affirmative (notwithstanding a treaty whereby Britain assumed protection over the Malayan peninsula including the Sultan's territory), the court dismissed the action, rejecting the argument that the Sultan had waived immunity by his conduct in England. Surely this extreme example of head of state immunity is incompatible with any of the contemporary justifications for immunity from jurisdiction of courts.

Very few other cases actually raise the issue of the personal immunity of sovereigns, though a number of French decisions in the nineteenth century suggest that foreign sovereigns are amenable to the jurisdiction of the French courts in actions based on their private activities, whether commercial or otherwise.<sup>12</sup> In one well-known Italian case, the Supreme Court of that country refused to allow immunity to the defendant who had entered into private contracts producing effects in Italy when he was Archduke, prior to ascending to the throne of Austria. Carlo d'Austria v. Nobili, Corte di Cassazione 11 March 1921, Giurisprudenza Italiana 1922 - I, 472; 1. Ann. Digest Pub'l Int'l Law Cas. 136 (1919-22).

Summary: The best one can say about the development of personal sovereign immunity is that there are very few decisions,

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<sup>12</sup> See Sompong Sucharitkul, State Immunities' and Trading Activities in International Law p. 49 and cases there cited. Also, Joseph M. Sweeney, The International Law of Sovereign Immunity p. 52 (Policy Research Study, U.S. Dept of State 1963).

and that the decisions and dicta relating to personal immunities of foreign sovereigns are not wholly consistent.<sup>13</sup> Neither the Schooner Exchange case in the U.S. Supreme Court nor the Duke of Brunswick case in the House of Lords supports the assertion that absolute immunity attaches to a sovereign sued on a commercial or private claim. In some instances sovereigns were regarded as not entitled to immunity in actions based on their private activities, even at a time when claims against foreign states were decided under the doctrine of absolute immunity.<sup>14</sup> In other instances, primarily in cases involving "sovereigns" in British protectorates in India or Malaya, claims even of a personal nature were regarded as barred by sovereign immunity,<sup>15</sup> unless the sovereign had himself sought the protection of the court.<sup>16</sup> No case is known in which the court of a state following the restrictive theory of immunity has granted immunity to a head of state in an action stemming from

<sup>13</sup> Accord, Sucharitkul, note 12 supra, p. 50.

<sup>14</sup> See, e.g., Munden v. Duke of Brunswick, 10 Q.B. 656 at 662 (1847) (Judgment for plaintiff in suit against former sovereign on annuity deed sustained, on the ground that "sovereign princes may contract obligations in their private capacity on considerations purely personal.... [The averment] that the defendant, when for good consideration he entered into a certain contract, was a sovereign prince....is clearly insufficient [to defeat the claim].")

<sup>15</sup> See Statham v. Statham and the Gaekwar of Baroda, [1912] p. 92 (Native prince in India dismissed as co-respondent in divorce action); Sayye v. Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State, [1952] 2 Q.B. 390 (former ruler of state now part of Pakistan entitled to immunity on claim for breach of contract).

<sup>16</sup> Sultan of Johore v. Abubakar Tunku Aris Bendahar, [1952] A.C. 318 (Privy Council) (Sultan entitled to be regarded as sovereign, but gave up immunity on the basis of having submitted to jurisdiction of Singapore court in related case).

a commercial activity.

II    Contemporary Law and Practice concerning  
Claims Against Foreign Heads of State

In an age in which the idea that the prince embodies sovereignty of the state no longer finds appeal, the law of claims against foreign heads of state depends essentially on two analogies -- sovereign immunity and diplomatic immunity.

On the one hand, if a claim is brought in a domestic court in substance directed against a foreign state, naming the head of state as a party defendant should not and does not change the result. If the state would be immune because the act complained of is an act *de jure imperii*, naming (and even suing) the head of state cannot make the claim viable. A number of such attempts have been made in the United States, all of them unsuccessful, with or without intervention by the State Department. See e.g., Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988) -- effort by alleged victims of U.S. bombing raid against Libya to sue Prime Minister Thatcher for permitting U.S. planes to take off from British bases; Kendall v. Kingdom of Saudi Arabia, 1977 Digest of U.S. Practice in International Law 1053 (S.D.N.Y. 1965) -- effort by alleged victims of shooting by Saudi Arabian militia in the Gulf of Aqaba to bring quasi *in rem* suit against Saudi Arabia and its King by attaching property in New York; Kline v. Kaneko, 141 Misc. 2d 787, 535 N.Y.S.2d 303 (Sup. Ct. N.Y. Cty. 1988) - effort to include the wife of the President of Mexico along with an official of the Mexican government in a suit asserting wrongful arrest and expulsion from

Mexico. It is clear that in all of these cases no claim could lie against the foreign state, and bringing in a king, a prime minister or the wife of the president could not breathe life into an unviable action. All were barred by the law of sovereign immunity, before and after the codification of the law in the Foreign Sovereign Immunities Act of 1976.

On the other hand, if a claim is brought against a senior foreign official who is present in the forum state, the amenability of the defendant is treated by analogy of the law of diplomatic immunity, sometimes described as the law of Special Missions.<sup>17</sup> The law is clear that a diplomatic agent accredited to a foreign state cannot be subjected to suit in that state for claims arising out of his official functions. Vienna Convention on Diplomatic Relations of 1961, Art. 31, 12 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95, and that rule is applied to high officials as well. Thus suit could not be maintained in the United States against Charles, Prince of Wales, while on an official mission to the United States, Kilroy v. Windsor, 1978 Digest of U.S. Practice in International Law 641, 81 Int'l Law Rep. 605 (1990) (N.D. Ohio 1978), even though the claim arose out of the Prince's activity in the United States; suit could not be maintained against the foreign minister of South Korea while traveling on an official mission to

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<sup>17</sup> See U.N. Convention on Special Missions, GA Res. 2530, GAOR Supp. No. 30 (1969) 9 I.L.M. 127 (1970), entered into force 21 June, 1985 (not in force in United States). See, for present purposes, Art. 31 (2)(c).

the United States, Chong Boon Kim v. Kim Yong Shik, 58 Am. J. Int'l L. 186 (1964) (Cir. Ct. Hawaii 1963); and suit could not be maintained against the Pope to enjoin him from celebrating mass on government property, O'Hair v. Woytilla, 1979 Digest of U.S. Practice in International Law 897 (D.D.C. 1979). I believe that if in any of these cases the attempted action had been based on a commercial activity conducted by the defendant in his private capacity (See Vienna Convention Art. 31 (1)(c)) and jurisdiction had been asserted on a basis other than personal service while the defendant was temporarily in the United States on an official mission, immunity would not have been allowed.

We have not seen cases in either analogous category that raise the question put in the present case, and indeed that case does not fit precisely under either category. The action brought by First American is not an action in substance against the state, as for example in Kendall v. Saudi Arabia, *supra*, and it is not an action brought against a head of state based on personal service in the forum state while traveling on an official mission, as for example in Kilroy v. Windsor. I therefore turn in the last part of this Memorandum to what I believe should be the proper solution, assuming no conclusive precedent prevails. Before doing so, however, I believe it is appropriate to mention some authoritative secondary sources.<sup>18</sup>

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<sup>18</sup> Most sources that I have consulted, including various treatises and the discussions of State Immunity and Sovereignty in the Encyclopedia of Public International Law, Vol. 10 (Max Planck Institute 1987) do not address the precise issue here presented at all. I have found no source -- primary or secondary -- that takes

The United Kingdom State Immunity Act, 1978 Laws c. 33, 10 Halsbury's Stat. 641 (4th ed. 1985) provides, in section 14(1)(a), that the immunities and privileges conferred by the Act on a foreign State apply also to "the sovereign or other head of the State in his public capacity." Section 20(1)(a) adds that the Diplomatic Privileges Act 1964, 1964 Laws c. 81, 10 Halsbury's Stat. 559 (4th ed. 1985), by which the United Kingdom implemented the Vienna Convention on Diplomatic Relations, shall apply to a sovereign or other head of state. Thus unlike the United States statute enacted two years earlier, the British statute does address head of state immunity in two places. The head of state as defendant in a civil suit is either equated to the state itself -- i.e., made subject to exemption from immunity in respect of proceedings relating to a commercial transaction (State Immunity Act, s.3), or he is equated to the head of a diplomatic mission -- i.e., made subject to exemption from immunity in respect of proceedings relating to any commercial activity outside of his official functions. Thus a commercial activity engaged in by a head of state is regarded either as official, and therefore adjudicable under the State Immunity Act as a claim against the state, or as unofficial, and thus adjudicable under the exception to immunity under the Diplomatic Privileges Act incorporating the Vienna Convention.<sup>19</sup>

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a position contrary to the position taken here.

<sup>19</sup> Accord: Dicey and Morris on Conflict of Laws, p. 238 (11th ed. Collins 1987).

The Restatement (Second) of the Foreign Relations Law of the United States (1965), drafted after the United States had embraced the restrictive theory of sovereign immunity but more than a decade before passage of the Foreign Sovereign Immunities Act, equated the immunity of a head of state to that of the state itself, §66(b). This meant (i) that foreign head of state is immune from suit in the United States (§65), but (ii) that the immunity does not extend to claims arising out of commercial activity outside the territory of his or her state. (§69).

The Restatement (Third) of the Foreign Relations Law of the United States does not contain a black letter rule concerning heads of state. But in comment and Reporters' Notes, it draws the same distinction drawn in this Memorandum and drawn by the British legislation discussed above. Reporters' Note 14 to §464 states that a proceeding against a head of state or government that is in essence a suit against the state, is treated like a claim against the state for purposes of immunity, i.e., with no immunity conferred with respect to claims arising out of commercial activity having the requisite contacts with the United States, §453, based on FSIA §1605(a)(2). An action against a head of state or government on an official visit to the forum state is equated to the diplomatic immunity accorded to high officials and special missions, §464 Reporters' Notes 13 and 14 and comment c, i.e., those of an accredited diplomat, §464.

Since the Restatement (Third) was being finalized as litigation was pending in the United States and elsewhere against

Ferdinand and Imelda Marcos and Jean-Claude Duvalier, the Restatement discusses at some length the question of immunity of former heads of state. The assumption of the drafters was that former heads of state would have no immunity from judicial jurisdiction; they might not be held liable in respect of claims based on their official acts while in office, but they would enjoy no immunity for their private acts, such as investment in American corporations or opening of bank accounts, even if those acts had been carried out while they were in office. See §464, Reporters' Note 14, citing Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986.), cert. dismissed, 480 U.S. 942 (1987). No instance was known to the drafters of the Restatement in which a claim had been asserted against a head of state while in office arising out of a private commercial activity in the United States, and thus the situation raised by the present action was not addressed expressly. In the scheme of the Restatement, however, there are only two kinds of immunity -- those of a state and those of a diplomatic agent.<sup>20</sup> If an action could not be defeated by an assertion of immunity under either category, there is no reason to believe that a special category would have been created, if the drafters had expressly addressed the issue, that would permit a head of state not on a special mission to avoid responding to a law suit based on commercial activity carried on in the United States.

Summary: None of the instances in which suggestions of head

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<sup>20</sup> I omit as not here relevant, immunities of consular agents, Restatement §465, or of officials of international organizations, §469.

of state immunity have been made in the United States concerned actions arising out of commercial activity in the United States. Neither the law of state immunity nor the law of diplomatic immunity provides shelter in an action arising out of commercial activity: if such activity is carried out on behalf of the state, it is governed by the commercial activity exception, and if it is carried out for private purposes, it is not covered by diplomatic immunity. It is fair to state, however, that no statute in the United States covers the precise circumstances raised in the present action, and no binding precedent resolves the question raised.

III Should Head of State Immunity Be Extended to Adjudication Growing out of Commercial Activity?

If, as shown in Part II of this Memorandum, there is no conclusive precedent on the issue of whether head of state immunity covers claims arising out of commercial activity of the head of state, the question remains when or whether such immunity should be allowed by courts in the United States, and when or whether, if requested, the Department of State should recommend (or "suggest") such immunity.

One reason for affording immunity from litigation to a head of state regardless of the nature of the claim would be to ensure that when the head of state travels to the forum state, he or she should not be diverted from or disturbed in carrying out the affairs of state. This consideration is especially compelling when the forum state is the United States, the seat of the United Nations, to which heads of state frequently travel. This suggests that

judicial jurisdiction over heads of state based on personal service in the forum state ("tag jurisdiction") should not be permitted. In general, I believe this is the customary international law, as reflected in the U.N. Convention on Special Missions of 1969 supra. See Restatement (Third) of the Foreign Relations Law of the United States §464 comment i and Reporters'Note 13 (1987). It says nothing about adjudication in which jurisdiction is asserted on the basis of activity in the forum directed from abroad causing effect in the forum state. As I understand it, it is on this basis, i.e., on the basis of long-arm jurisdiction, that the action presently under consideration was initiated. Whether the defendants' activity or the effect caused in the forum state are sufficient to support the exercise of jurisdiction remains to be decided, see, e.g., International Shoe Co. v. Washington, 326 U.S. 310 (1945); Asahi Metal Industry Co. Ltd. v. Superior Court, 480 U.S. 102 (1987); Restatement (Third) §421, but that question may -- and I believe should -- be resolved independently of the personal status of the defendant.

A second reason for affording immunity from adjudication to a head of state might be some concept of reciprocity. But that only suggests that the appropriate line should be maintained between amenability to jurisdiction and immunity, just as it was in the drafting of the Foreign Sovereign Immunities Act, and in the decision of the United States government in the 1970's (reversing earlier policy) not to plead sovereign immunity abroad in instances where, under the restrictive principle of sovereign immunity, a

foreign State's immunity would not be recognized in the United States.<sup>21</sup>

It is not up to the United States, of course, to pass judgment on the ways other nations are governed or their assets are invested. A foreign head of a state where private and state property are not clearly separated may well act entirely consistently with the law of that state when he makes decisions about that property, including decisions about investing the property abroad, assumption of duties under the law of the state where the property is invested, and making submissions to the regulatory authorities of that state. But the consequences of such action, as I see it, should be that for purposes of adjudicating claims brought in the state where the activity is carried out, the head of state -- the "sovereign" in the original meaning of the term -- should be treated just like the state itself -- neither more nor less favorably.

Thus a head of state should not be required to defend actions based on strictly governmental activity -- *de jure imperii*. A former government employee claiming a wrongful discharge, for instance, or a former prisoner claiming false arrest or mistreatment while in custody should no more be able to bring suit in the United States against the head of state than against the state itself, even if he asserts that the decision to discharge, or to

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<sup>21</sup> See U.S. response to the Legal Counsel of the United Nations on the topic of "Jurisdictional Immunities of States and their Property", qu. 20, Materials on Jurisdictional Immunities of States and their Property, p. 638 (U.N. Legisl. Series 1982)

arrest, had been that of the head of state himself.<sup>22</sup> But on claims for which the foreign state would be amenable to suit in the United States, for instance for breach of a contract to purchase building materials,<sup>23</sup> or failure to honor a promise to discharge a debt,<sup>24</sup> it should make no difference whether the obligation was entered into by the state or by the head of state, or whether the obligation of one was guaranteed by the other. It should not, as it seems to me, be incumbent on a person claiming to have been injured by the commercial activity of a head of state to establish whether a given activity was undertaken with "private" or "public" funds, or for public or private purposes. Indeed, such an inquiry might well be beyond the scope of authority of an American court. On the other hand, it should not be a defense on the issue of jurisdiction to adjudicate (putting aside substantive defenses as to liability, including respondeat superior) that the head of state was or was not acting on behalf of the state. Whether the challenged commercial activity was carried out by the head of state as agent or as principal, the head of state should be required to answer for it in court, subject of course to the other requirements of personal and subject matter jurisdiction, but without benefit of

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<sup>22</sup> Thus for instance, Saudi Arabia v. Nelson, 113 S. Ct 1471 (1993) should have come out the same way if King Fahd himself had been named a defendant.

<sup>23</sup> See e.g., Texas Trading & Billing Corp. v. Federal Republic of Nigeria, 647 F.2d 300, cert. denied, 454 U.S. 1148 (1982); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

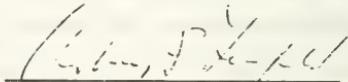
<sup>24</sup> See e.g., Republic of Argentina v. Weltover, 112 S.Ct. 2160 (1992)

any immunity.

Conclusion

The guiding principle with respect to resolution of controversies growing out of commercial transactions is reciprocity. In an ordinary contract between A and B under which each party undertakes obligations to the other, A is amenable to suit by B, and B is amenable to suit by A. We now know that in the United States, as in the great majority of other nations, this is true even when B is a foreign state. It should be equally true if B is a head of state. B may not be denied the right to be a plaintiff, and neither should A.<sup>25</sup>

Accordingly I believe the Department of State should not make any suggestion of immunity in the present case, and if the issue comes before the U.S. district court, that court should not dismiss Sheikh Zayed from the action.



Andreas F. Lowenfeld  
Charles L. Denison  
Professor of Law

November 14, 1993

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<sup>25</sup> I might point out that I made essentially the same point, with regard to states, in my Report to the State Department a quarter century ago. See ¶ 7 supra and "Claims against Foreign States," note 2 supra, 44 N.Y.U. L. Rev. at 914-16.

MEMORANDUM

To: Department of State, Office of the Legal Adviser

Re: Request For Head Of State Immunity For Sheikh Zayed,  
et al.

We understand that the State Department's Legal Adviser's office has been approached by the law firm of Patton, Boggs & Blow in an effort to obtain a suggestion of immunity pursuant to the head of state doctrine for certain of the Abu Dhabi defendants named in First American Corporation v. Zayed, Civ. No. 93-1309 (JHG) (D.D.C. filed June 25, 1993).<sup>1/</sup>

Neither U.S. law, customary international law nor State Department practice support a suggestion of immunity in this case.<sup>2/</sup> In fact, a suggestion of immunity for the private

<sup>1/</sup> For the purposes of this memorandum, the term "the Abu Dhabi defendants" will be used to refer collectively to defendants Sheikh Zayed bin Sultan Al-Nahyan ("Zayed"), Sheikh Khalifa bin Zayed Al-Nahyan ("Khalifa"), Sheikh Sultan bin Zayed Al-Nahyan ("Sultan") and Department of Private Affairs of Sheikh Zayed ("Private Department").

<sup>2/</sup> This memorandum is addressed only to the applicability of the commercial activities exception to the head of state claim made here. It does not address the question of whether any of the defendants is in fact a head of state. We note, however, that only Sheikh Zayed bin Sultan Al-Nahyan may have an arguable claim to head of state status. Zayed cannot, however, predicate his claim on his status as head of the emirate of Abu Dhabi, which does not enjoy separate diplomatic relations with the United States or otherwise possess the attributes of a nation-state. Two other defendants to First American's action, Sheikh Humaid bin Rashid Al-Nuaimi and Sheikh Hamid bin Mohammed Al-Sharqui, have also claimed complete immunity before the U.S. District Court on the grounds that they are heads of individual emirates and members of the Supreme Council of the United Arab Emirates. Memorandum In Support of Joint Motion To Dismiss of Sheikh Humaid bin Rashid Al-Nuami, (continued...)

commercial activities of the Abu Dhabi defendants in the United States would be an unprecedented extension of head of state immunity. Moreover, these defendants have waived any claim to head of state immunity, first, by seeking the assistance of the U.S. District Court in obtaining immediate repayment of debt obligations issued to First American Corporation and its affiliates ("First American") as part of the scheme to acquire and maintain control of the bank, and, second, by engaging in activity in the highly regulated U.S. banking system.

I. **A Foreign Head Of State Should Not Be Granted Immunity For Private Commercial Conduct.**

The conduct of the Abu Dhabi defendants which is at the heart of First American's lawsuit does not satisfy the requirements for immunity under either U.S. or international law. The First American action focuses not on any public or official act by Zayed, but on private investments of a wholly commercial nature.<sup>2/</sup> These investments constituted personal efforts to

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<sup>2/</sup>(...continued)

Sheikh Hamad bin Mohammed Al-Sharqui and Mashreq Holding Company, N.A. at 3-13. There is, of course, no precedent for extension of head of state immunity to all members of a ruling council.

<sup>2/</sup> First American's action plainly involves the defendants' commercial activities. Congress has made clear that "investment in a security of an American corporation" -- much less acquisition of a dominant or controlling ownership interest in that corporation -- is the sort of commercial activity for which the FSIA and restrictive immunity doctrines generally deny immunity. H.R. Rep. No. 1487 at 16-17, (reprinted in 1976 U.S.C.C.A.N. at 6615). The sovereign immunity statutes of many countries specifically exclude immunity for proceedings by a corporation whose principal place of business is in the forum against a shareholder who is a foreign sovereign. See notes 12 and 13, infra.

secretly place private funds in "safe haven" foreign institutions and to provide Zayed with a nest egg in the event of his future overthrow in Abu Dhabi.

Since at least 1952, United States law governing immunity, like the law applied by most members of the international community, has been based upon a restrictive theory under which foreign states, diplomats, and heads of state are not accorded immunity for private commercial activity taking place in or directly affecting the United States. In fact, we are not aware of a single instance in which the State Department has suggested immunity for the commercial acts of a head of state carried on in the United States.

The Abu Dhabi defendants are requesting that the State Department abandon this long-standing policy and grant them absolute immunity for their misconduct. Such a radical departure from historical practice would be unjustified in any case but would be particularly unwise here, where the misconduct alleged involved illegal infiltration and abuse of a regulated industry in the United States and was part of a broader scheme that caused billions of dollars of losses to BCCI depositors around the globe.

A. The United States Follows The Restrictive Theory With Respect To All Immunity Questions.

1. The Enactment Of The FSIA Confirmed The United States' Adoption Of, And Practice Of Applying, The Restrictive Theory Of Immunity.

Prior to the enactment of the Foreign Sovereign Immunities Act ("FSIA"),<sup>4</sup> the immunity of a head of state was intertwined with the immunity of his state. See Restatement (Second) of Foreign Relations Law of the United States § 66 (1965) (stating that "[t]he immunity of a foreign state under the rule stated in § 65 [(stating the restrictive theory)] extends to . . . its head of state"); Jerrold L. Mallory, Note, Resolving the Confusion Over Head of State Immunity, 86 Colum. L. Rev. 169, 171 (1986) (noting that from the mid-1930's until the enactment of the FSIA, courts did not distinguish between heads of state and foreign states in addressing immunity questions).

In 1952, the United States Department of State officially embraced the restrictive approach to immunity, thus limiting immunity to official, non-commercial acts of the sovereign. See Letter from Jack B. Tate, Acting Legal Adviser of the U.S. Dep't of State, to Acting Attorney General Phillip B. Perlman (May 19, 1952), reprinted in 26 Dep't St. Bull. No. 678, at 984-85 (1952) (hereinafter "Tate Letter") (noting that "the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts"). The State

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<sup>4</sup> Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611).

Department's policy announcement did not articulate any change in the United States' practice of treating immunity for heads of state as a question of foreign state immunity. See id.; see also Restatement (Second) of Foreign Relations § 66.

In 1976, Congress passed the FSIA, thus codifying the restrictive theory of immunity. See 28 U.S.C. § 1605(a). The statute was drafted by the Departments of State and Justice,<sup>2</sup> and was almost unanimously supported by the academic community and the private bar. The principal purpose of the FSIA is well established: "[t]o assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would."<sup>3</sup> As noted throughout the legislative history, a consistent application of the restrictive theory of immunity was "urgently needed" in a "world where foreign state enterprises are every day participants in commercial activities."<sup>4</sup>

The near unanimous comments of the Executive and Congressional sponsors and other supporters indicate that the

<sup>2</sup> See H.R. Rep. No. 1487, at 9-10, 44-46, reprinted in 1976 U.S.C.C.A.N. at 6608, 6634-35); Subcomm. on Claims and Governmental Relations of the House Committee on the Judiciary, 93d Cong., 1st Sess., Report on Administration of Military Claims in Europe, Appendix A at 21 (describing the Executive Communication accompanying H.R. 3493, the predecessor bill to the FSIA).

<sup>3</sup> Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Gov. Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 24 (1976) (hereinafter "Hearings") (statement of Monroe Leigh, Legal Adviser, Dep't of State).

<sup>4</sup> H.R. Rep. 1487, 94th Cong., 2d Sess. 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605.

State Department was not well-equipped to perform the function of making immunity decisions under a restrictive theory because of its susceptibility to diplomatic pressure.<sup>4</sup> An important purpose of the FSIA was "assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process."<sup>5</sup>

The FSIA applies only to defendants that are "foreign states", a term further defined in the statute. 28 U.S.C. § 1603(a) & (b). The statute does not specifically address head of state immunity, and courts have generally found that the FSIA does not cover heads of state -- though in very different factual circumstances.<sup>10</sup> Thus, particularly when the effort was made to

<sup>4</sup> S. Rep. No. 1310, 94th Cong., 2d Sess. 9 (1976) (hereinafter "Senate Report"); H.R. Rep. 1487, reprinted in 1976 U.S.C.C.A.N. at 6605-06.

<sup>5</sup> The House Report explained:

A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. . . . U.S. immunity practice would conform to the practice in virtually every other country -- where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

H.R. Rep. No. 1487, at 7, reprinted in 1976 U.S.C.C.A.N. at 6606.

<sup>10</sup> See generally Bass, supra, at 301-02 n. 10-11. However, courts have applied the FSIA to individuals when sued for (continued...)

interfere with the travel of a visiting dignitary, courts have deferred to suggestions of head of state immunity from the State Department. There is no indication in the legislative history of the FSIA that the omission of head of state immunity was designed to permit commercial activity by heads of state to be free of the possibility of judicial challenge. Certainly nothing in the text or legislative history of the FSIA (including the comments of State and Justice Department representatives) suggests that in 1976 the United States intended to retreat from the restrictive theory of immunity that it had followed for (at least) the previous twenty-four years. It simply does not follow that, because Congress and the Executive desired to codify the restrictive theory and transfer to the courts immunity questions for foreign states, they desired sub silentio to establish a new absolute theory of immunity for heads of state.

2. The Practice of The State Department And U.S. Courts Suggests A Restrictive Theory of Head of State Immunity.

To our knowledge, the State Department has not, in modern times, issued a suggestion of immunity in a single reported case involving the commercial activity of a head of state in the United States.

Most State Department suggestions of immunity for heads of state or governments have been issued in cases involving claims

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<sup>10</sup>(...continued)

actions undertaken while acting as representatives of a "foreign state" under the FSIA. See, e.g., Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1101 (9th Cir. 1990); Herbage v. Meese, 747 F. Supp. 60, 62 (D.D.C. 1990), aff'd mem. 946 F.2d 1564 (D.C. Cir. 1991); Rios v. Marshall, 530 F. Supp. 351, 371 (S.D.N.Y. 1986).

arising out of public or official acts in and on behalf of the foreign state. See, e.g., Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988) (non-commercial tort claims against British Prime Minister for allowing U.S. jets based in Britain to participate in bombing raid on Libya), aff'd, 886 F.2d 438 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990); Domingo v. Marcos, Civ. No. 82-1055 (W.D. Wash. 1982), mdf'd, 808 F.2d 1349 (9th Cir. 1987) (wrongful death action against Philippines President for alleged involvement of security officers in killing of protester); Psinakis v. Marcos (N.D. Cal. 1975), reported in 1975 Dig. U.S. Prac. Int'l L. 344 (libel action against Philippines President for calling an anti-government individual a terrorist); Kendall v. Kingdom of Saudi Arabia, reported in 1977 Dig. U.S. Prac. Int'l L. 1053 (S.D.N.Y. 1965) (non-commercial tort claims against King Faisal arising out of Saudi militia's firing on plane in Gulf of Aqaba); Kline v. Kaneko, 535 N.Y.S.2d 303 (N.Y. Sup. Ct. 1988) (non-commercial tort claims against wife of Mexican president for wrongful arrest in Mexico and extradition).

In a few cases, the State Department has suggested immunity in suits in which service was attempted to be made during the leader's official travel, or where the suit was based on activities relating to official diplomatic visits or to other official diplomatic functions in the United States. Gerritsen v. De La Madrid Hurtado, Civ. No. 86-5726 (C.D. Cal. 1985) (suit against Mexican President and consular officials for alleged beating and kidnapping of protester distributing anti-government leaflets in front of the Mexican consulate) (facts described at 819 F.2d 1511, 1513 (9th Cir. 1987)); O'Hair v. Woityla, reported

in 1979 Dig. U.S. Prac. Int'l L. 897 (D.D.C. 1979), (suit to enjoin Pope John Paul from celebrating mass in Washington, D.C.; suit dismissed under the FSIA); Chong Boon Kim v. Kim Yong Shik, (Haw. Cir. Ct. 1963), summarized in 58 Am. J. Int'l L. 186-87 (1964) (foreign minister served in the United States while on an official visit). In Kilroy v. Windsor, reported in 1978 Dig. U.S. Prac. Int'l L. 641 (N.D. Ohio 1978), plaintiff brought a noncommercial tort suit against, inter alia, Prince Charles, alleging that he conspired to deprive plaintiff of his constitutional rights. The suit arose out of plaintiff's arrest by State Department security officers during the award of an honorary degree to the Prince on an official visit to the United States. See id. at 642. These cases clearly would not fall under the commercial activity exceptions of the FSIA or the Vienna Convention on Diplomatic Relations. See 28 U.S.C. § 1605(a)(2).

In their Motion to Dismiss, the Abu Dhabi defendants cite Anonymous v. Anonymous, 581 N.Y.S.2d 776 (N.Y. App. Div. 1992), as supporting absolute immunity for heads of state because the court found that it was bound by a State Department suggestion of immunity where the action arose out of "purely personal circumstances." Memorandum In Support Of The Abu Dhabi Sovereign Defendants' Motion to Dismiss, First American Corp. v. Zayed, Civ. No. 93-1309 (JHG) (D.D.C. Sept. 30, 1993) (hereinafter "Abu Dhabi Motion"). Regardless of the court's view of its power to override the Department of State's immunity determination, the case does not suggest that an absolute theory of immunity was applied by the State Department. The suit, which is described by

the court only as a "matrimonial action," does not appear to involve any commercial activity, much less any commercial activity taking place in or affecting the United States. In fact, if any inference can be drawn from the nature of the suit, it relates to rights and obligations arising out of a foreign marriage.

Notably, in other cases involving the same Abu Dhabi defendants, the State Department has not suggested immunity. In Lasidi, S.A. v. Financiera Avenida, S.A., 538 N.E.2d 332, 333 (N.Y. 1989), the New York Court of Appeals dismissed counterclaims brought by a corporate alter ego of Zayed as a sanction for Zayed's refusal to submit to a pre-trial deposition. The Court noted that the government had filed only a "suggestion of interest" asking that "any intrusion on the dignity of Sheikh Zayed's office" be minimized and that "the United States assumes that U.S. courts will not require personal discovery from a foreign head of state in the absence of a demonstrated need."

Similarly, both the Securities and Exchange Commission and Financial General Bankshares ("FGB", the corporate predecessor of First American) sued Defendant Sultan bin Zayed al-Nahyan in connection with his participation in the takeover of FGB in 1978. No suggestion of head of state immunity was made by the Department of State in these proceedings. SEC v. Bank of Credit and Commerce International, S.A., Civ. No. 78-0469 (D.D.C. filed March 17, 1978); Financial General Bankshares, Inc. v. Lance, Civ. No. 78-0276 (D.D.C. filed Feb. 17, 1978). In fact, in the Lance case the District Court authorized depositions against Sultan and his brother, Mohammed, 80 F.R.D. 22 (D.D.C. 1978), and

later issued a preliminary injunction enjoining them from acquiring any further interest in FGB stock. See 1978 Fed. Sec. L. Rep. (CCH) ¶ 96,403 (D.D.C. 1978).

As the foregoing cases demonstrate, the Abu Dhabi defendants' contention that absolute immunity is "the universal rule recognized by American jurisprudence" (Abu Dhabi Motion at 9) is meritless.<sup>117</sup> The United States, since at least 1952, has consistently applied the restrictive theory of immunity to both foreign states and heads of state. It cannot be fairly said that the United States retreated from that position in enacting the FSIA. To the contrary, the available cases demonstrate that the State Department has continued to follow the restrictive theory in making suggestions of immunity. As explained below, there are no good reasons for departing in this case from a theory accepted in international law and consistently followed in the United States for at least the last forty-one years.

B. International Law Supports Restrictive Immunity For Foreign Heads Of State.

The modern trend in international jurisprudence and legislation is to grant only restrictive immunity to foreign heads of state as well as to states themselves. Although there

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<sup>117</sup> As Chief Justice Marshall observed nearly two centuries ago:

A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual.

The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 145 (1812).

has been relatively little foreign jurisprudence on head of state immunity, judicial decisions long ago foreshadowed this modern trend towards a restrictive approach. As early as 1921, the Italian Court of Cassation of Rome rejected a plea of head of state immunity for acts done by the Emperor of Austria before assuming his throne, stating:

The present proceedings do not relate to acts done by the Emperor of Austria as head of his own State. The engagements in question have their origin in contracts and acts of a private nature which arose in Italy.

Nobili v. Emperor Charles I of Austria, 1 I.L.R. 136 (Cass. 1921) (Italy).

The dearth - and direction - of international law on head of state immunity was explained by the Pakistan Supreme Court in 1981:

In the nature of things there are few opportunities for clarifying whether any exceptions now exist to the immunity of a foreign sovereign. Cases which come to court nearly always concern not the personal status or the personal property of the head of State, but the status or property of the State as a legal entity. . . . Although heads of State visit other States not only on formal visits but also on private visits, any disregard by them of their obligations of the laws and regulations of the State they are visiting is almost unheard of. However, certain exceptions to full immunities may be said to be inherently justifiable, even if it cannot be said that they are fully supported by extensive practice. For instance . . . [i]f the foreign sovereign engages in a trading venture or in speculative investment, it may be justifiable to subject him to civil suit or to deny him tax exemption on his profits.

Qureshi v. Union of Soviet Socialist Republics, 64 I.L.R. 585, 617, P.L.D. 1981 S.Ct. 377 (S.Ct. 1981) (Pakistan) (involving

transaction occurring before the passage of the Pakistan State Immunity Ordinance).

The restrictive theory of immunity has also been codified in immunity statutes enacted in numerous countries around the world in recent times.<sup>12</sup> It has likewise been incorporated into international conventions, such as the European Convention on State Immunity which has been adopted by more than twenty European nations.<sup>13</sup> The adoption of these statutes and conventions reflects a recognition that the restrictive theory of immunity is an established component of customary international law.<sup>14</sup> See Preamble to European Convention on State Immunity ("Taking into account the fact that there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts"); Hugh M. Kindred, et al., International Law: Chiefly as Interpreted and Applied in Canada 307 (4th ed. 1987) (observing that the Canadian Act legislating

<sup>12</sup> See, e.g., Australia Foreign States Immunities Act of 1985 §§ 3(3)(b), 11(1), 16; Act to Provide for State Immunity in Canadian Courts of 1982 §§ 2, 5; Pakistan State Immunity Ordinance of 1981 §§ 5(1)(a), 9, 15(1)(a); Singapore State Immunity Act of 1979 §§ 5(1)(a), 10, 16(1)(a); South Africa Foreign Sovereign Immunity Act of 1981 §§ 1(2)(a), 4(1)(a), 9; United Kingdom State Immunity Act of 1978 §§ 3(1)(a), 8 (1), 14(1)(a).

<sup>13</sup> European Convention on State Immunity (May 16, 1972), reprinted in 11 I.L.M. 470, art. 4, 6 (1972) (Council of Europe).

<sup>14</sup> The only nations that may continue to adhere to an absolute approach to immunity appear to be less-developed or socialist nations. See, e.g., Chile: Analysis of Legislative Principles, in United Nations Legislative Series, Materials on Jurisdictional Immunities of States and Their Property 12 (1982) (hereinafter "U.N. Materials"); Hungary Law-Decree No. 13 of 1979 on Private International Law § 56(a); India Code of Civil Procedure § 86; see also Mallory, *supra*, at 178 & n.37.

restrictive immunity for heads of state and states reflected then-current customary international law).<sup>15</sup>

The well-settled law of diplomatic immunity also embodies the restrictive theory of immunity. The Vienna Convention on Diplomatic Relations, which has been adopted by 167 countries (including the United States and United Arab Emirates), provides that there is no immunity for "an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions."<sup>16</sup> See also Restatement (Third) of Foreign Relations § 464, comment f (1987). This standard is derived from the same principles that underlie the restrictive theory of sovereign immunity. As the Swiss Federal Tribunal observed in denying immunity to a former head of state:

Personal immunity is in fact the reflection of the immunity enjoyed by a foreign State when it acts *jure imperii*, that is to say, in the exercise of its sovereign powers. The Vienna Convention on Diplomatic Relations of 18 April 1961 simply translates into a normative act a concept based on international customary law.

Marcos and Associates v. Chambre D'Accusation, Geneva, 82 I.L.R. 53, 57 (Fed. Trib. 1988) (Switzerland).

Although there appears to be no international consensus on whether a head of state should be treated as a sovereign state or

<sup>15</sup> In its Constitution, the United Arab Emirates appears to have adopted the restrictive theory of immunity with respect to suits against the state. U.A.E. Const., art. 102.

<sup>16</sup> Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, art. 31; Diplomatic Relations Act of 1978, 22 U.S.C. § 254b (requiring that nonparties to the Convention be treated as required under the Convention).

as a diplomatic agent,<sup>17</sup> this distinction is immaterial here. Under either characterization, customary international law requires the same result: there is no immunity for private commercial acts. As discussed below, there is simply no justification -- or precedent -- for granting a head of state greater immunity for his personal commercial acts than for his actions as a sovereign or in a diplomatic capacity.

C. **There Is No Policy Rationale For Expanding Head Of State Immunity Into An Unqualified Immunity.**

The same principles requiring the adoption of the restrictive approach to sovereign immunity also argue for the application of that approach to heads of state.<sup>18</sup> Just as states have become more involved with commerce,<sup>19</sup> so too have

<sup>17</sup> As one commentator has stated, on the issue of head of state immunity from civil law, "[s]ome states act on the assumption that the head of state can enjoy no greater immunity than the state itself, while others consider that he can be afforded no less immunity than that granted to the highest ranking diplomatic agent . . . ." N.A. Maryan Green, International Law 129 (3rd ed. 1987). Compare, e.g., Act to Provide for State Immunity in Canadian Courts of 1982 and Pakistan State Immunity Ordinance of 1981 and Singapore State Immunity Act of 1979 and South Africa Foreign Sovereign Immunity Act of 1981 (head of state acting in public capacity is covered by state immunity statutes, but statutes are silent as to head of state's private acts) with Australia Foreign States Immunities Act of 1985 § 36(1) and United Kingdom State Immunity Act of 1978 § 20(1)(a) (head of state's official acts are covered by state immunity statutes, but private acts are governed by Vienna Convention).

<sup>18</sup> Indeed, the Abu Dhabi defendants themselves appear to acknowledge as much, stating that the FSIA applies to Zayed, Khalifa and Sultan "by analogy" (Abu Dhabi Motion at 12 n.4), and that head of state immunity is "similar" to diplomatic immunity (*id.* at 10).

<sup>19</sup> As Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice, testified at hearings on (continued...)

certain heads of state such as Zayed become wealthy enough to engage in international commerce on a regular basis, and on a massive scale.<sup>24</sup> It would be unfair to allow such persons to take advantage of U.S. laws to protect and secure their assets (outside the reach of their subjects) and then claim that they are beyond the reach of those same laws, even with regard to those very same investment actions.

Nor can considerations of sovereignty outweigh the justification for restrictive head of state immunity in a commercial context. As the Department of Justice representative testified regarding jurisdiction over foreign states:

That consideration [of the widespread practice of governments engaging in commercial activities] outweighs the traditional rationale for absolute foreign sovereign immunity, as that doctrine developed in the 19th century, namely, the desirability of avoiding adjudication which might affront a foreign nation and thus embarrass the

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<sup>19</sup>(...continued)  
the FSIA:

The restrictive theory rests, at bottom, upon the consideration that the widespread practice on the part of governments engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 30 (1976) (testimony of Bruno A. Ristau).

<sup>24</sup> Sufficient numbers of wealthy foreign rulers possess both ample private resources and title and control over the "public" resources of their state -- such as Zayed does over those of Abu Dhabi -- so as to create a genuine need for restrictive immunity. Among the twenty-five richest people in the world, six are members of ruling families. Alison Rogers, The Billionaires: The World's 101 Richest People, Fortune, June 28, 1993, at 44-46 (copy attached at Tab 1).

executive branch in its conduct of foreign relations.

However, it is manifest now that the adjudication of a commercial claim against a foreign state on the merits does not affront the sovereignty of a foreign nation because sovereignty, as such, is not implicated in such an adjudication. The foreign state makes its appearance in the marketplace as a merchant, not as a sovereign, and it is as a merchant that the foreign state is adjudged liable on its commercial obligations.

Jurisdiction of U.S. courts in Suits Against Foreign States:

Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess., at 29 (1976). Similarly, heads of state who appear in the marketplace as merchants -- and on their own, personal behalf -- should be treated like any other merchant or investor. As Lord Denning has observed, in a modern society "[i]t is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction." Rahimtoola v. Nizam of Hyderabad, 24 I.L.R. 175, 196-97, [1958] A.C. 379 (House of Lords 1957) (England) (op. of Lord Denning). The assumption of jurisdiction by a U.S. court over private commercial claims would be a proper exercise of the United States' own sovereignty over activity within its borders which causes damage in the United States.

Finally, adopting a policy of absolute immunity for foreign heads of state would harm U.S. interests. Such an action by the Department would create a rule that not only is unfair to U.S.

individuals and businesses but would also discourage them from dealing with foreign heads of state in the future. It would also permit wealthy foreign rulers to ignore with impunity important U.S. disclosure regulations and other laws in their commercial investments and other dealings in the United States. And once immunity has been granted to these defendants for such obviously significant commercial U.S. activity, it would be extraordinarily difficult for the State Department to change course in subsequent cases without offending similarly situated heads of state.

For the Department to allow the Abu Dhabi defendants immunity here would constitute a change from the traditional role of the Department, which "has been generally disposed not to inject itself to deny an American plaintiff his day in court, preferring to leave issues of immunity in particular cases to the courts and perhaps general policy to Congressional legislation." See Louis Henkin, *Foreign Affairs and the Constitution* 63-64 (1972). It was for just these reasons that Congress enacted the FSIA to transfer questions of sovereign immunity from the Department to the courts. A suggestion of immunity in the present circumstances could well evoke a congressional or judicial response that would further limit the role of the State Department in such immunity decisions.

Although not expressly precluded by U.S. law, suggestions of head of state immunity by the Department are not a right but a privilege, which should be extended cautiously.<sup>21</sup> This is

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<sup>21</sup> See United States v. Noriega, 746 F. Supp. 1506, 1520 (S.D. Fla. 1990) ("the grant of [head of state] immunity is a privilege which the United States may withhold from any claimant").

especially so where the head of state in his private capacity stands accused of complicity in frauds in violation of U.S. regulatory laws through commercial, non-official activities. After all, part of the reason for the sparseness of the case law on head of state immunity is that heads of state usually obey the laws of other countries.<sup>22</sup> When they do not, particularly on a scale as large as in this case, the Department of State should not go out of its way to protect the offending head of state.

**II. The Abu Dhabi Defendants Should Not Be Permitted To Assert Immunity When They Have Invested For Personal Profit In A Regulated Industry And Have Invoked The Benefits Of U.S. Courts To Pursue Related Claims.**

**A. The Abu Dhabi Defendants Waived Immunity By Seeking Repayment In The District Court.**

As they did in the Lasidi litigation in 1982, Zayed and the Abu Dhabi defendants once again seek the assistance of the Department of State in attempting to cloak themselves in head of state immunity, and thus insulate themselves from the reach of United States courts, while simultaneously using those courts to their own advantage. See, e.g., Lasidi, 538 N.E.2d at 334. This time, these defendants would like the Department to make them immune from the reach of the same U.S. District Court in which they sought to recover some of the same funds that are the subject of this action only two days before First American's Complaint was filed. See Application for Clarification of Trust Order and Request for Oral Hearing, United States v. BCCI Holdings (Luxembourg), S.A., Crim. No. 91-0655 (JHG) (D.D.C. June 23, 1993). The Abu Dhabi defendants "want[] our law, like any

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<sup>22</sup> See Qureshi, 64 I.L.R. at 617.

other litigant, but [they] want[] our law free from the claims of justice." See National City Bank v. Republic of China, 348 U.S. 356, 361-62 (1955).

The defendants have waived any arguable claim to head of state immunity by invoking the processes of the District Court to pursue claims arising from the same dispute. The Supreme Court has recognized that a foreign sovereign that sues in U.S. court waives any right to immunity on counterclaims asserted by its opponent, at least up to the amount of the claim. National City Bank, 348 U.S. 356. The FSIA makes clear that even that limitation applies only to unrelated counterclaims. 28 U.S.C. § 1607(c). Related counterclaims -- and, we would submit, claims separately filed in related proceedings -- are unlimited. 28 U.S.C. § 1607(b). See Restatement (Third) of Foreign Relations § 456 and comment f (1987).

Here, the Abu Dhabi defendants filed an application with the District Court only two days before First American's suit was filed, demanding that the Court-appointed Trustee be ordered to proceed with the immediate repayment of certain indebtedness of First American and its affiliates. Application for Clarification of Trust Order, supra. Though filed under a criminal case number, the defendants' application implicates the same underlying events as does First American's civil Complaint. As alleged in the Complaint, the loan agreements in question were an integral part of the defendants' scheme to maintain and conceal their unlawful control of First American. See Complaint, First American Corp. v. Zayed, Civ. No. 93-1309 (JHG) (D.D.C. June 25, 1993), ¶¶ 528-35. Courts have often recognized that foreign

sovereigns may lose immunity in one proceeding by participating in another proceeding. See, e.g., In re Oil Spill by "Amoco Cadiz" off Coast of France, 491 F. Supp. 161, 167-68 (N.D. Ill. 1979); Barragan v. Banco BCH, 232 Cal. Rptr. 758, 764-65 (Ct. App. 1986).

Rather than file a civil suit that would unequivocally subject them to the court's jurisdiction over First American's counterclaims, defendants have pursued their civil debt claim through a request for "clarification" of the order appointing First American's Trustee which was entered in the BCCI criminal forfeiture action.<sup>23</sup> First American cannot, of course, assert its civil counterclaim in that proceeding and, indeed, is not a party to that proceeding. These defendants should not, however, be allowed to escape the application of waiver principles that are based on considerations of fundamental fairness simply because of the highly unusual procedural circumstances surrounding the dispute with First American.<sup>24</sup> The Abu Dhabi

<sup>23</sup> In their Application in the proceedings in the criminal action, the Abu Dhabi defendants put at issue whether the debts in question were "legally enforceable under normal principles of commercial law." Clarification of Order Appointing Trustee at 13, United States v. BCCI Holdings (Luxembourg), S.A., Crim. No. 91-0655 (JHG) (D.D.C. Aug. 19, 1993). Accordingly, the Abu Dhabi defendants' efforts to cause the First American Trustee to immediately repay the debt obligations are the equivalent of a civil claim to enforce those obligations and thus result in a waiver of the defendants' immunity claims.

<sup>24</sup> Indeed, if the Department should decide to suggest that the District Court grant immunity to the Abu Dhabi defendants, we would urge the court, if it accepted the suggestion at all, to condition any immunity on a waiver by the Abu Dhabi defendants of any right to pursue claims -- in any U.S. forum -- against First American or its affiliates. If these defendants are immunized against First American's claims,

(continued...)

defendants cannot be allowed to use the U.S. courts as both sword and shield, and the State Department should not lend its assistance to any such effort.

B. The Abu Dhabi Defendants Submitted To The U.S. Banking And Securities Regulatory Regime And All Of Its Enforcement Mechanisms.

In addition, the Abu Dhabi defendants have waived any claim they may have had to head of state immunity with regard to their involvement in First American by investing in a company which was subject to extensive governmental regulation and control. By engaging in activity in a highly regulated area, the Abu Dhabi defendants are clearly subject to the laws of the United States. See Restatement (Third) of Foreign Relations § 461 and comment b and Reporters' Note 3(iv). Moreover, by making application to the respective authorities, including the Federal Reserve Board, the Comptroller of the Currency and state bank regulatory authorities, the Abu Dhabi defendants and their agents have clearly submitted to the jurisdiction of the United States in respect of those activities. That submission to jurisdiction encompasses the applicable regulatory and enforcement authority as well as all attendant civil<sup>24</sup> and possibly even criminal liabilities. This waiver should extend to damage claims by regulated institutions (or their government successors in

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<sup>24</sup>(...continued)

they should not be able to continue to pursue First American at the same time.

<sup>25</sup> Consistent with this, both the U.S. government and the courts apparently ignored or rejected head of state immunity for these Abu Dhabi defendants in the litigation arising out of the initial FGB takeover attempt in 1978. See discussion of SEC v. BCCI and FGB v. Lance, above.

interest). To provide immunity to a head of state in circumstances where he has been engaged in commercial activity involving an important, regulated area such as banking would frustrate the interests not only of private U.S. citizens but also of federal and state government regulators.

It would be extraordinary for the Abu Dhabi defendants to be able to claim that the Office of the Comptroller of the Currency, the Federal Reserve, the Securities and Exchange Commission and other regulatory and law enforcement agencies meant, when allowing various of the Abu Dhabi defendants to purchase shares in FGB and later CCAH, that these defendants would be immune from and unreachable by regulatory and law enforcement mechanisms for any harm or illegalities they might cause. Indeed, the FGB and CCAH shareholders, including the Abu Dhabi defendants, acknowledged such submission by purporting to comply with (while deceiving) the bank regulators through the filing of false reports, by purporting to obey a cease and desist order regarding the initial FGB tender offer, and by various other actions.

### III. Conclusion.

For the reasons stated above, the Department should not grant the Abu Dhabi defendants' demand for a suggestion of head of state immunity. First American's claim against Sheikh Zayed and other members of the Ruling Family is based on allegations of private, commercial activity that caused injury to a United States corporation. The Complaint focuses on the defendants' investment in, and control of, a prominent United States financial institution and alleges numerous violations by the

defendants of United States banking and securities laws in connection with this commercial activity. These same defendants have now sought the benefits and protection of U.S. laws by intervening in a U.S. District Court proceeding to obtain funds from First American that are directly related to the subject of this action.

Furthermore, First American's action against the Abu Dhabi defendants is much more than a mere private dispute between two parties. There are hundreds of thousands of injured parties, both here and abroad, who seek to have these defendants held to account for their wrongs. See, e.g., Motion for Leave to File Brief of BCCI Depositors' Protection Association Et Al. as Amici Curiae, First American Corp. v. Zayed, Civ. No. 93-1309 (JHG) (October 25, 1993) (noting the stake of BCCI depositors and creditors in First American's lawsuit). The Luxembourg Court of Appeals' recent rejection of the proposed settlement between BCCI liquidators and Abu Dhabi makes it even more likely that Zayed and the Abu Dhabi defendants will be sued by others -- particularly the liquidators of BCCI -- both here and abroad.<sup>28</sup> This would certainly produce a great deal of additional information concerning the involvement of these defendants in BCCI and in First American. Any suggestion of immunity may adversely impact more than just First American's claims against these defendants, and should be assessed in light of the probability of continuing (and somewhat unpredictable) developments.

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<sup>28</sup> See "More to Hear," Review & Outlook, Wall St. J., November 1, 1993, at A16 (copy attached at Tab 2).

In these circumstances, the State Department should not lend assistance to an effort by these defendants to avoid the adjudication of First American's claims. It is difficult to imagine a situation in which the interests of the United States (and all other nations injured by the BCCI scandal) could be more aligned against granting immunity to these defendants. It does not serve anyone's interests -- including those of the country that Sheikh Zayed currently rules -- to allow a foreign ruler's personal actions to interfere with the ability of a nation to maintain the integrity of its financial institutions. It would be ironic indeed if the State Department, on dubious legal and ambiguous foreign policy grounds, suggested an immunity that deprived not only a U.S. bank of substantial claims but also the United States Treasury as a beneficiary of these claims. Moreover, it would hardly serve the interests of either the American public or the victims of BCCI (who have a significant interest in First American's action) to permit the parties who are alleged to have been centrally responsible for the biggest bank fraud in history to escape responsibility on the basis of a "suggestion" from the Department of State.

Respectfully submitted,

*Jones, Day, Reavis & Pogue*  
Jones, Day, Reavis & Pogue

STATEMENT OF THE ABU DHABI RULING FAMILY  
BEFORE THE  
COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS  
OF THE  
U.S. HOUSE OF REPRESENTATIVES

December 9, 1993

H.H. Sheikh Zayed bin Sultan Al Nahyan is the President of the United Arab Emirates and the Ruler of Abu Dhabi. His son, H.H. Sheikh Khalifa bin Zayed Al Nahyan, is Deputy Supreme Commander of the U.A.E. Armed Forces, Crown Prince and Deputy Ruler of Abu Dhabi, and Prime Minister of Abu Dhabi. H.H. Sheikh Zayed, H.H. Sheikh Khalifa, the Abu Dhabi Department of Finance, and the Abu Dhabi Investment Authority ("ADIA") have since April 1990 been majority shareholders of BCCI Holdings (Luxembourg) S.A. (together with its subsidiary banks, "BCCI"). Prior to that time the President, his son, and ADIA were passive shareholders in BCCI. Since 1983, they have also each held passive minority interests in the top-tier parent company of the First American banks. These shareholdings are the basis of the questions posed by the Committee on Banking, Finance and Urban Affairs.

Middleton A. Martin has been authorized to represent the U.A.E. President and his family for the limited purpose of addressing the questions raised by the Committee. This appearance is voluntary and without prejudice to the sovereignty of the U.A.E. President and his family.

We were invited to testify before the Committee to discuss the following issues:

- "the basis for your request for head of state immunity;" and
- "would a grant of head of state immunity set a bad precedent as far as protecting the safety and soundness of our banking system."

Following a summary of the background of how our clients came to be the principal owners of BCCI, and a discussion of the separate, legitimate interests held by members of the Ruling Family of Abu Dhabi and ADIA in the top-tier parent of the First American banks, these issues are addressed in turn below.

#### I. Background of Abu Dhabi Interest in BCCI

Abu Dhabi is the largest of seven emirates comprising the United Arab Emirates, a federal union founded in 1971. The United Arab Emirates is governed by a Supreme Council comprising the rulers of the seven emirates. The Supreme Council elects one of its members as President and a second member as Vice President, both for a term of office of five years. Since the establishment of the union in 1971, H.H. Sheikh Zayed bin Sultan Al Nahyan has been President of the United Arab Emirates. He has also been the Ruler of the Emirate of Abu Dhabi since 1966.

The Bank of Credit and Commerce International S.A. was established as a bank in 1972 by Agha Hasan Abedi, with financial support from Bank of America, following the nationalization in the same year of the United Bank in Pakistan, which had been run by Abedi. The initial capital was 50,000 shares, of which 25 percent was held by Bank of America. H.H. Sheikh Zayed took 20 percent of the shares, at a total cost of \$500,000. In 1974, BCCI Holdings (Luxembourg) S.A. was established, and a former senior vice-president of Bank of America joined Abedi on the board. Shortly thereafter, shares of BCCI Holdings (Luxembourg) S.A. were exchanged for those of the Bank of Credit and Commerce International S.A. (which became a principal banking subsidiary), and the Abu Dhabi interest dropped to less than 5 percent of BCCI's outstanding share capital. The Abu Dhabi interest was entirely passive.

In 1981, Abedi persuaded ADIA to purchase a 10 percent stake in BCCI. ADIA is a governmental institution that is responsible for placing a portion of Abu Dhabi's oil revenues in a broad spectrum of investments, in order to ensure a stable economic base of income for future generations of Abu Dhabi citizens regardless of future developments in the oil industry.

Throughout the period of their investment, the Ruling Family and ADIA received financial statements, audited by large and reputable accounting firms such as Price Waterhouse and Ernst & Whinney (now Ernst & Young). The statements indicated that BCCI was financially healthy and indeed profitable. BCCI expanded into more than 70 countries, where it was subject to national regulation. BCCI Holdings (Luxembourg) S.A. was subject to oversight by the Luxembourg Monetary Institute. The Bank of Credit and Commerce International S.A., one of two principal subsidiary banks, was headquartered in London. Its branches in England, the largest branch network in the BCCI organization, were subject to supervision by the Bank of England. The Bank of Credit and Commerce International (Overseas) Ltd., the second principal subsidiary bank, was headquartered in Grand Cayman and subject to the supervision of the Caymans Inspector of Banks and Trust Companies. In 1987, a College of Regulators was formed, including the three national regulatory bodies noted above. Given the unqualified audit reports of the accountants, and the extensive supervision by regulators, the Abu Dhabi investors had no reason to suspect that there were financial problems.

The situation changed in the spring of 1990. In April 1990, senior management revealed that BCCI had suffered significant

losses, and Price Waterhouse for the first time identified certain transactions that had been "either false or deceitful." The Price Waterhouse report was sent to the Bank of England and was discussed at a meeting between the Bank of England, the Luxembourg Monetary Institute, Price Waterhouse, and BCCI management in April 1990. With the full support of the Bank of England, the Abu Dhabi Department of Finance (which previously had owned no BCCI shares) purchased 15 million outstanding shares and subscribed for 10 million additional shares issued by BCCI. The share issuance was intended to cover the losses that had been identified and to restore the liquidity of the BCCI subsidiary banks. As a result of these steps, and the outlay of \$1.2 billion, the Abu Dhabi investors became the owners of 77 percent of the stock of BCCI.

Upon acquiring a majority interest in BCCI, the Abu Dhabi investors (who will be termed the Majority Shareholders for ease of reference) made three critical decisions. First, Swaleh Naqvi, the chief executive officer of BCCI, was relieved of executive power. (Abedi had been inactive since suffering a heart attack in 1988, and Naqvi, his deputy, had assumed responsibility for BCCI.) Second, it was decided to make orderly reductions in the size and geographic scope of BCCI. Third, at

the encouragement of the College of Regulators, a decision was made to move the headquarters of BCCI to Abu Dhabi from London, so that the Majority Shareholders could begin to monitor some of the activities of BCCI management.

Implementation of these and other decisions was hindered in the summer of 1990 by threats from Iraq against the Arab Gulf countries, including the United Arab Emirates. The United Arab Emirates is a small nation, with limited human resources, and these threats and the subsequent action to expel Iraq from Kuwait required the full attention of the U.A.E. leadership.

Despite these impediments, the Majority Shareholders proceeded to develop a plan to restructure and recapitalize BCCI to avoid the failure of the banks, which would have entailed losses for millions of depositors and other customers around the world. In connection with these efforts, the Majority Shareholders were prepared to commit further substantial amounts of money to support a restructured organization with banks headquartered in London, Hong Kong, and Abu Dhabi that would have new management. The Bank of England and the Luxembourg Monetary Institute actively encouraged such restructuring in meetings during the summer of 1990, and the Bank of England agreed in principle that as part of the restructuring it would be possible

to incorporate an entity to carry on a banking business in England.

In October 1990, Price Waterhouse provided a report to the BCCI board of directors that identified large new problem loans and stated that "previous management may have colluded with . . . major customers to misstate or disguise the underlying purpose of significant transactions." The October 1990 Price Waterhouse report suggested that massive fraud may have been carried out over past years by the management of BCCI. The Majority Shareholders then initiated, again with the support of the Bank of England, an Investigating Committee to determine what had occurred, how it was accomplished, and who was responsible.

As a result of these disclosures, the Majority Shareholders demanded Naqvi's formal resignation. Russell Reynolds, an executive recruiting firm, were retained to find a new senior management. Naqvi was retained, but only in order to be available to the Investigating Committee. He was extensively interviewed by Price Waterhouse and Ernst & Young, which were both represented on the Investigating Committee. It was clear to all concerned that Naqvi's assistance would be essential for the Investigating Committee to obtain a complete understanding of the fraud then coming to light.

Outside the United States, while the work of the Investigating Committee continued, discussions for the restructuring of BCCI were brought to a conclusion in May 1991. In May and June 1991, with the encouragement of the Bank of England and Price Waterhouse and the full knowledge of the College of Regulators, the Majority Shareholders took the first steps to put in place the negotiated series of financial measures designed to complete the restructuring. Nevertheless, in July 1991 the Bank of England and other regulators abruptly closed BCCI's principal banking operations. This decision caused the financial disaster that has now befallen the depositors and other creditors of BCCI. Since July 1991, control of BCCI has been in the hands of liquidators appointed by courts in the United Kingdom, Luxembourg, the Cayman Islands, and elsewhere.

The Majority Shareholders are by far the greatest victims of BCCI's frauds. In May 1992, their representative informed a subcommittee of the Senate Foreign Relations Committee that their losses totalled in excess of \$6 billion. It now appears clear that the Majority Shareholders' losses from BCCI actually exceed \$9 billion.

## II. Secret BCCI Interest in CCAH

Within the United States, the focus of the BCCI scandal has been on BCCI loans secured by pledged shares of the voting stock

of Credit and Commerce American Holdings, N.V. ("CCAH"), the parent holding company of First American Corporation ("FAC"), First American Bankshares, Inc. ("FAB") and their subsidiary banks. Once it became clear that there were potential violations of U.S. banking law, the Majority Shareholders decided that BCCI's operations in the United States must be terminated and that BCCI should cooperate with U.S. authorities in resolving outstanding regulatory problems resulting from the activities carried out previously by Abedi, Naqvi, and their associates.

In November 1990, the Deputy Associate Director of the Division of Banking Supervision and Regulation of the Federal Reserve Board requested a copy of the October 1990 Price Waterhouse report from BCCI. Shortly thereafter, at the insistence of the Majority Shareholders, the acting chief executive officer of BCCI met with the Federal Reserve official in London and provided him the Price Waterhouse report to read. The report showed outstanding loans of \$1,332 million secured by CCAH shares.

BCCI's U.S. legal counsel met with the General Counsel and other senior Federal Reserve staff on December 21, 1990, and notified them that the information in the October Price Waterhouse report and from other sources raised a substantial

question as to whether BCCI may have acquired control of CCAH (and thus indirectly of the First American subsidiary banks) in violation of the Bank Holding Company Act. On December 26, 1990, the General Counsel of the Federal Reserve wrote BCCI counsel requesting information pertaining to loans from BCCI to the shareholders of CCAH. On January 2, 1991, BCCI counsel provided to the Federal Reserve summary information showing that there were outstanding non-performing loans from BCCI to shareholders of record of CCAH who owned some 60 percent of the CCAH stock.

Two days later, on January 4, 1991, the Federal Reserve Board issued formal Orders of Investigation of BCCI and CCAH. Pursuant to these Orders, Federal Reserve staff began obtaining documents from various First American banks and BCCI offices in the United States.

In spite of its best efforts, however, it was clear that the Federal Reserve Board would not be able to obtain written evidence of the violations without the cooperation of BCCI. Virtually all of the documentation concerning the loans made by BCCI to the CCAH shareholders was located outside the United States. Following the course of cooperation they had already set, the Majority Shareholders determined that BCCI should provide all possible assistance to the Federal Reserve. At the

request of the Board's General Counsel, BCCI's counsel traveled to Abu Dhabi on the eve of the liberation of Kuwait in order to review documents relating to CCAH. These documents were included among some 6,000 files that previously had been maintained in the BCCI London head office and at the home of Mr. Naqvi, and which came to be known as the "Naqvi files." This review revealed a variety of secret nominee arrangements that had been made between BCCI or its affiliated companies and the CCAH shareholders who were loan customers of BCCI.

In mid-January 1991, the General Counsel of the Federal Reserve was given a general description of these documents, and more detailed descriptions were provided in subsequent meetings. It was the Board's view, as subsequently stated in a release accompanying its notice of initiation of enforcement proceedings against BCCI, that the arrangements violated express commitments in the CCAH application to the Board to become a bank holding company. That application had stated that BCCI would have no ownership interest in CCAH, that BCCI was not funding the acquisition of shares of CCAH, and that none of the CCAH shareholders held his interest as an unidentified agent for BCCI. The documents showed, however, that BCCI had funded the acquisition of CCAH shares and was the actual owner of at least

25 percent of the CCAH shares at the time CCAH acquired First American in 1982.

Federal Reserve investigative officials requested the assistance of BCCI counsel in interviewing Mr. Imran Imam, a BCCI employee who formerly had worked in Mr. Naqvi's office in London. Mr. Imam was located in London and not subject to subpoena. With the assistance of the Majority Shareholders, arrangements were made for Federal Reserve officials to interview Mr. Imam in London on February 14 and 15, 1991. It is a matter of record that Mr. Imam has subsequently provided substantial assistance to the Board and to other U.S. investigative authorities.

The information provided by Mr. Imam increased the desire of federal investigative officials to interview Mr. Naqvi, who was at the time residing in Abu Dhabi, and to review his files in Abu Dhabi relevant to their investigation. With the Majority Shareholders' assistance, arrangements were made for a team of Federal Reserve investigative staff to visit Abu Dhabi from March 16 to March 22, 1991. While the Federal Reserve team was en route, Mr. Naqvi demanded that he be provided a U.S. lawyer before meeting with them. A U.S. lawyer resident in Dubai was located and introduced to Mr. Naqvi. Over the course of the week, the lawyer interviewed Mr. Naqvi extensively, but indicated

that he was unable to become sufficiently familiar with the case in that time to permit Mr. Naqvi to be interviewed by the Federal Reserve officials. Accordingly, a substantive discussion between them and Mr. Naqvi was prevented at his lawyer's insistence.

Federal Reserve staff did conduct interviews of five BCCI employees in Abu Dhabi. In addition, they were given access to all of the so-called Naqvi files then identifiable as pertaining to CCAH, the National Bank of Georgia, and Independence Bank. Review of these documents occupied most of the Federal Reserve investigators' time over the six-day period. As part of their review, the Federal Reserve officials asked and were permitted to copy documents of particular interest. A large box was filled with approximately 10,000 documents and sealed at their request. It was agreed that these documents would be kept at the offices of Allen & Overy, BCCI's U.K. lawyers, to allow the Federal Reserve ready access while it continued its investigation and to provide time to determine how the documents might be provided to Board officials without violating applicable bank secrecy laws protecting customer information.

These documents, which were subsequently obtained by the Federal Reserve Board and provided to U.S. law enforcement authorities, served as the basis for the Board's enforcement

actions and the criminal charges brought against BCCI and certain of its customers, as well as Abedi and Naqvi, by the U.S. Attorney for the District of Columbia and the New York County District Attorney. These charges culminated in a plea agreement filed in the U.S. District Court in Washington, D.C. in December 1991 (the "Plea Agreement"), in which BCCI admitted to owning a portion of the shares of CCAH.

The bank secrecy laws of some of the jurisdictions at issue provide no exception for review by regulatory or law enforcement officials. At the Majority Shareholders' insistence, BCCI sought and was able to obtain formal or informal waivers of those laws in some jurisdictions. For the most part, however, BCCI, which at that time was operating in some 72 countries, faced a significant risk of lawsuits from its customers alleging violation of these laws. Thus, the role played by the Majority Shareholders was critical in providing the information that served as the basis for the BCCI enforcement actions and prosecutions.

### III. Ruling Family and ADIA Interest in CCAH

The U.A.E. President, his son, and ADIA each has a direct shareholding in CCAH that is entirely legitimate, has always been fully disclosed, and is wholly separate from BCCI's secret and

illegal shareholding in CCAH. H.H. Sheikh Zayed owns 12 percent and H.H. Sheikh Khalifa owns 10 percent of the voting shares of CCAH. ADIA owns 6 percent of the CCAH stock. These investments have always been of a passive nature. Indeed, the genuine nature of these investments was one of the few undisputed facts accepted by both prosecution and defense in the recent Altman trial in New York.

The actions described below all were taken by and on behalf of the Ruling Family. BCCI, which since July 1991 has been separately represented by its Liquidators, has acted independently in these matters.

A. Provision of Capital

The downturn in the economy, the troubled condition of the commercial real estate market in the greater Washington, D.C. area, and the adverse publicity surrounding the ownership of CCAH shares by BCCI all created a difficult and potentially damaging situation for the First American banks. Even though their shareholdings amount to only 22 percent of CCAH, the Abu Dhabi Ruling Family in 1991 responded to requests to provide financial support to First American in the absence of viable alternative sources of financing. Accordingly, in February 1991, they provided \$48 million of a \$51 million bridge loan to CCAH and

FAC. Following discussions in London between a representative of the Ruling Family and senior Federal Reserve officials, the Ruling Family in June 1991 extended an additional \$39 million loan to FAC. At the same time, they provided further capital assistance by purchasing \$82 million of outstanding FAB debt and waiving certain loan defaults that were preventing the issuance of financial statements. This was done at the specific and repeated request of FAB's Chairman, (then Board member) Mathias and other current members of the FAB board and management.

More recently, the Ruling Family purchased a term loan to FAC in the principal amount of \$9,350,000 from Banque Arabe et Internationale d'Investissement ("BAII"). Again, Senator Mathias, his colleagues at Jones, Day, Reavis & Pogue who have filed the First American lawsuit, and other current members of the FAB board urgently requested that our clients purchase the loan and agree to a waiver of any defaults, including default caused by non-payment. Despite the unfavorable terms, the Ruling Family agreed to purchase the loan and to defer payment and waive any default resulting from non-payment until January 1, 1993. The Ruling Family has provided similar extensions and waivers with regard to the other debt owed to it by CCAH, FAC, and FAB,

all in order to provide visible and meaningful direct financial assistance to First American.

As a result of the financing described above, in addition to loans made in December 1990, the Ruling Family and ADIA are now owed \$190 million in principal by First American. First American expressly represented and warranted to the Ruling Family that First American's debt obligations to them were valid, binding, and enforceable, were duly authorized by First American management, and that First American had no claims or causes of action arising out of those debt obligations. First American's current Executive Vice President of Legal Affairs participated in negotiating and drafting these representations and warranties, which were acknowledged by First American to be material terms of the loan transaction.

The financing provided by the Ruling Family enabled the First American subsidiary banks to weather the difficult period of 1991-1992, to maintain their value, and ultimately to be sold for a very attractive price.

B. Management Changes

As a result of its reported financial difficulties and the publicity resulting from the shut-down of BCCI in early July 1991 and congressional hearings into BCCI's secret ownership of CCAH

shares, by August 1991 First American was suffering a significant outflow of deposits. The situation was of sufficient concern to Senator Mathias and the other outside directors of First American that they sought the resignation of Clark Clifford and Robert Altman from their First American management and director positions. To assist in resolving this matter, representatives of the Ruling Family agreed to call a special meeting of the shareholders of CCAH to consider changes in the First American directors and management. Shortly thereafter, Mr. Clifford and Mr. Altman agreed to resign their positions. Nicholas Katzenbach, a former Attorney General and Deputy Secretary of State, agreed to accept the position of Chairman of the board of FAB. His willingness to serve on the board of directors was conditioned, however, upon (i) indemnification for himself and the other directors, and (ii) appointment of a trustee to hold the disputed shares.

Because of the Ruling Family's concern that First American have independent management at this period of crisis, it agreed to provide indemnities to Mr. Katzenbach, Senator Mathias, and the other directors against claims arising out of their service as directors of FAC and FAB. These indemnities represented a substantial contingent liability, in addition to the financings

described above, undertaken to ensure that First American would have effective, responsible management acceptable to its regulators.

C. Trust Arrangement

In March 1991, BCCI, the Federal Reserve Board, and the Superintendent of Banks of the State of New York entered into a consent cease-and-desist order whereby BCCI agreed to divest any shares of CCAH it might be deemed to control, to refrain from engaging in transactions with the First American banks except as authorized by the Federal Reserve, to submit a plan for closure of the BCCI agencies in Los Angeles and New York, and to continue to cooperate in the Board's investigation of the possible acquisition of CCAH shares by BCCI. The consent order provided that the divestiture plan "should include arrangements for the custody and control of such shares of CCAH pending the completion of the divestiture required by this order." As part of its divestiture plan, BCCI submitted a draft trust agreement providing for the creation of a trust that would hold the shares of CCAH pledged to BCCI. The divestiture plan and the draft trust agreement were under consideration by Board staff when BCCI was shut down in July 1991.

The closure of BCCI's principal banking operations by the Bank of England and the other regulatory authorities, and the appointment of provisional liquidators to conduct the affairs of BCCI, made implementation of a trust at the CCAH level difficult or impossible as a practical matter. The BCCI Liquidators refused to take any action with regard to the pledged shares for fear of waiving certain rights they believed they had under refinancing documents that the Majority Shareholders had signed in May 1991 as part of the planned restructuring of BCCI. There were also other technical legal questions.

In any event, Federal Reserve staff in early August 1991 requested the assistance of the Ruling Family in creating a trust that would hold 100 percent of the shares of one of the intermediate First American holding companies. Counsel for the Ruling Family undertook to revise the draft trust agreement previously submitted to the Board by BCCI to reflect this changed approach. It was determined that a lower-level trust (*i.e.*, one involving the shares of FAC or FAB rather than CCAH) would be much more complex as a legal matter and would require the affirmative approval of the CCAH shareholders. Nevertheless, as part of its program of cooperation, representatives of the Ruling Family were willing to call a shareholders' meeting for this

purpose and to recommend the trust that would be proposed.

Significantly, H.H. Sheikh Zayed and H.H. Shiekh Khalifa were willing to place their legitimate direct interests in the trust, although there was no legal obligation to do so. ADIA made a similar undertaking.

While the trust agreement was being redrafted, efforts were made to identify an appropriate trustee. After meeting with Harry Albright, representatives of the Ruling Family indicated that they had no objection to his appointment. Federal Reserve staff then undertook to develop a trust plan that would be presented to the CCAH shareholders at a meeting called for this purpose in May 1992. The Ruling Family and ADIA voted to approve the trust plan and urged the other CCAH shareholders (both the holders of record and the BCCI Liquidators) to do the same. The proposal was approved by a vote of over 75 percent of the shareholders.

In June 1992, the U.S. District Court for the District of Columbia issued an order appointing Mr. Albright as Trustee to effect the sale or other disposition of the stock of FAC or its assets, including FAB and FAB's subsidiaries. Shortly after his appointment, Mr. Albright began to test the limits of his powers. In spite of the fact that Mr. Katzenbach had expressed his full

encouragement and consent to the appointment of the Trustee, Mr. Albright decided to terminate his chairmanship of FAB and to replace him with a Chairman of Mr. Albright's own selection. Mr. Albright also rebuffed efforts by the Ruling Family to advance the sale of First American. Even though the Ruling Family had hired Smith, Barney & Company to explore financing arrangements that would expedite the sale process, Mr. Albright let it be known that he thought they should play no role whatsoever in the sale -- even though their interest in a prompt sale at the best possible price was plain. Nevertheless, the potential availability of this financing was known in the financial markets and undoubtedly increased the initial interest in the bidding.

IV. Sale of First American Assets and Application for  
Prompt Repayment of Debt

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In June 1993, the Trustee reported that the Washington-area bank subsidiaries of First American had been sold to First Union Corporation for \$453 million. He indicated that sales of other First American assets are expected to produce at least another \$50 million

When it appeared that the bulk of First American's assets would be sold at a price well in excess of the amount owed to our clients, we approached Mr. Albright to determine when the

outstanding debt of over \$220 million owed to the Ruling Family and ADIA would be paid. As described above, First American had represented and warranted that these debt obligations were binding, valid, and legally enforceable. Remarkably, rather than acknowledging the debt and establishing a timetable for its repayment, the Trustee articulated a novel set of criteria that he intended to apply in determining whether the debt was bona fide, criteria that would require him to complete a wide-ranging, costly, and redundant investigation into the BCCI scandal before paying valid creditors of First American.

Because we viewed the Trustee's response as inconsistent with the Trust Order, we asked the Court to reaffirm that the terms of the Order required First American's debt to be repaid promptly and in accordance with standard principles of commercial law normally applicable to credit instruments. In August 1993, the Court clarified the order as we requested, holding that "it was never intended that First American's financial obligations could be negated through the application of standards wholly inconsistent with long-established principles of commercial law." The Court thus rejected the criteria proposed by the Trustee that would have extended his tenure for many years.

V. First American Lawsuit

Immediately following our filing of the Application for Clarification of the Trust Order, First American filed in the same Court a complaint seeking \$1.5 billion in damages from the Ruling Family, ADIA, the other CCAH shareholders, and various other parties for alleged harm to First American. The basis for this retaliatory lawsuit is an alleged conspiracy to own First American in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO").

The Ruling Family and ADIA (as well as a high-ranking ADIA official who is also a defendant) are responding vigorously in court to the outrageous claims made by First American. The First American lawsuit is premised on the absurd notion that the President of a friendly foreign nation, other members of his family who are high-ranking government officials there, and other government leaders and institutions willingly participated in a secret scheme that resulted in the use of billions of dollars of their money secretly to take over a U.S. banking company whose total value was less than \$200 million in 1982. To accept First American's arguments, it is also necessary to believe that the Ruling Family and ADIA, who together had over \$140 million in equity invested in CCAH, who in the past two years loaned over

\$190 million to various First American companies to avert the failure of the subsidiary banks, and who never received a penny in dividends, somehow benefited from this alleged scheme while First American itself, whose assets have been or will be sold to raise more than \$500 million, was somehow damaged.

The asserted motive for such seemingly incomprehensible activity is that the Ruler of Abu Dhabi wished to gain political influence in the United States by using First American in some ill-defined way for political advantage, presumably because of its presence in the nation's capital. The First American complaint, however, does not even attempt to explain how the alleged secret and illegal control of a U.S. bank could enhance anyone's political influence. As the Federal Reserve has testified before this and other congressional committees over the past three years, "[t]he Federal Reserve's examinations, and those of other federal and state regulators, have to date uncovered no evidence of abuse of the credit facilities of the First American banks for the benefit of BCCI or its affiliates." This conclusion was reached after 50 experienced examiners from 12 Federal Reserve Banks spent over eight man-years examining the First American banks, including a review of all loans over \$50,000 that were charged off between 1982 and 1991.

Although it is inappropriate to discuss in detail a lawsuit that is pending before a court, it must be noted that the federal judge to whom this case has been assigned is familiar with the BCCI matter by virtue of her supervision of the BCCI criminal cases. It is not surprising, therefore, that First American would wish to have an alternative forum in which to present its meritless case. The motion to dismiss First American's complaint that we filed on behalf of the Ruling Family and ADIA sets forth, in addition to sovereignty, a number of independent grounds for dismissal, even assuming for purposes of argument (as all litigants must at this preliminary, procedural stage of litigation) that First American's patently implausible scenario is true. These include:

- Lack of Standing/Injury. At the time First American allegedly was harmed, it was owned by the very parties who are the defendants in the lawsuit. It is those parties -- not the First American Trustee -- who suffered the harm, if there had been any harm, from the acts alleged in the lawsuit. Under established Supreme Court precedent, First American has no standing to sue in these circumstances.
- Untimeliness. The core allegation in the First American lawsuit was litigated over 15 years ago in an action brought by First American's corporate predecessor, Financial General Bankshares, Inc. Under applicable statutes of limitations, the claims asserted in the First American lawsuit are now time-barred.

- Pleading Defects. First American failed to satisfy a number of pleading requirements under both RICO and the common law. In essence, this means that First American as a legal matter has failed to state valid causes of action against the defendants.

#### VI. Basis of Request for Head of State Immunity

Head of state immunity is granted, usually following a suggestion of immunity filed by the U.S. Government, to any sitting head of state as a matter of customary, international law. In the absence of a suggestion of immunity filed by the U.S. Government, it is incumbent upon the Court to apply principles of international law in making its own determination as to questions of immunity. When the U.S. Government makes a suggestion of immunity to a court in a particular case, however, that suggestion will simply be given effect by the court. Thus, the State Department has adopted procedures that govern its consideration of requests for suggestions of head of state immunity. All communications between us and the U.A.E. Government and the State Department have been in accordance with these procedures.

The Committee specifically requested that we explain the basis for the request by the Government of the United Arab Emirates that the U.S. Government recognize that its Head of

State and his immediate family are entitled to absolute immunity from a civil lawsuit such as the action brought by First American. The legal basis for a grant of head of state immunity to the U.A.E. President and his family from the First American lawsuit, as presented to the State Department and to the Court in our pleadings supporting the motion to dismiss, is set forth below.

A. U.S. Law on Head of State Immunity

In cases where suggestions of immunity have been filed, U.S. courts consistently have recognized absolute immunity for sitting heads of state who have not otherwise consented to the jurisdiction of a domestic court. Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988), aff'd, 886 F.2d 438 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990) (dismissing suit against British Prime Minister Margaret Thatcher); O'Hair v. Wojtyla, 1979 Dig. U.S. Prac. Int'l L. 897 (D.D.C. 1979) (dismissing suit against His Holiness Pope John Paul II, Head of State of Vatican City); Psinakis v. Marcos, 1975 Dig. U.S. Prac. Int'l L. 344 (N.D. Cal. 1975) (dismissing action against President Marcos); Kendal v. Kingdom of Saudi Arabia, 1977 Dig. U.S. Prac. Int'l L. 1053 (S.D.N.Y. 1965) (dismissing suit against King Faisal and other officials); Anonymous v. Anonymous, 581 N.Y.S.2d 776 (N.Y.

App. Div. 1992) (dismissing suit against head of state in action arising out of "purely personal circumstances"); Chong Boon Kim v. Kim Yong Shik, 58 Am. J. Int'l L. 186 (Haw. Cir. Ct. 1963) (dismissing suit against Korean Foreign Minister).

The rule of absolute immunity for foreign heads of state was most recently reaffirmed in Anonymous v. Anonymous, 181 A.D.2d 629, 581 N.Y.S.2d 776 (N.Y. App. Div. 1992). There, the court rejected the plaintiff's argument that the purely personal nature of the activities giving rise to the suit warranted the exercise of jurisdiction over the foreign head of state and dismissed the action. In so ruling, the court found that it was bound by the U.S. Government's suggestion of immunity for a head of state in a matrimonial action, even though the action arose out of "purely personal circumstances."

Enactment in 1976 of the Foreign Sovereign Immunities Act ("FSIA") in no way altered the long-standing rule of absolute immunity from judicial process applicable to foreign heads of state. Indeed, both the State Department and the U.S. courts consistently have recognized that foreign heads of state fall outside the ambit of the FSIA. For example, in the post-FSIA case Saltany v. Reagan, 702 F. Supp. 319 (D.D.C. 1988), a suggestion of immunity was filed on behalf of British Prime

Minister Thatcher in an action to recover damages for death, personal injury, and the destruction of property which occurred during the 1986 Libya air strikes. The suggestion of immunity filed by the United States, in discussing the respect that a court must afford such a suggestion, stated that the FSIA has "no effect on the binding nature of the Executive's suggestions of head of state immunity."

. It is equally clear that a head of state's immediate family is entitled to the same degree of immunity as the foreign leader. For example, in the post-FSIA case of Kline v. Kaneko, 535 N.Y.S.2d 303 (Sup. Ct. N.Y. 1988), the court held that it was bound to follow the suggestion of immunity that was filed by the U.S. Attorney on behalf of Paloma Cordero de la Madrid, the wife of the President of Mexico. The Court stated that "[u]nder general principles of international law, heads of State and immediate members of their families are immune from suit. The United States follows that rule and implements it by the filing of a suggestion of immunity."

B. International Law on Head of State Immunity

In its past practice, the Department of State has concluded that immunity for sitting heads of foreign governments is required by international law and has made it clear that the

United States would seek -- and would expect to receive -- this immunity for its high government officials in similar circumstances. The practice in the United States is consistent with international law and the practice of other states.

The presumptive rule in international law is that a foreign head of state is immune as to both public (or sovereign) acts and private (or commercial) acts. The restrictive theory that has come to prevail in circumstances involving questions of sovereign immunity has not displaced the traditional rule that sitting heads of foreign states enjoy absolute immunity.

The ancient and venerable doctrine of absolute immunity for foreign heads of state is well-established, and its continued validity is made clear in authoritative treatises on international law:

[L]ittle has changed in the theory of personal immunity of a foreign sovereign or head of state, an immunity based on old and recognized customary rules of international law. Regardless of whether an individual is constitutionally the actual head of state or only its nominal head, he or she enjoys complete immunity from suit or judicial process in the territory of another state. This principle applies equally to crowned heads of state and elected heads of state, as well as to their immediate families.

Gerhard von Glahn, Law Among Nations: An Introduction to Public International Law 137-38 (4th ed. 1992).

Since states are independent and equal, no state may exercise jurisdiction over another state without its consent; in particular, the courts of one state may not assume jurisdiction over another state. Historically, the ruler was equated with the state, and to this day the head of a foreign state possesses complete immunity, even for acts done by him in a private capacity.

Michael Akehurst, A Modern Introduction to International Law 111

(6th ed. 1987)

The current practice of the international community is entirely consistent with the summary of international law found in these treatises. Despite some state-to-state variance in the details of head of state immunity doctrine, no decision has been found in which a sitting head of state was subjected to the civil jurisdiction of another nation against his or her will, whether or not commercial activities assertedly in violation of the forum's law were involved. The following brief survey shows that most other nations follow the rule of customary international law providing absolute immunity to heads of state:

France. A sitting head of state enjoys immunity in the French courts even for purely private commercial transactions. King Farouk v. Christian Dior, S.A.R.L., 84 Clunet 717 (Cour d'Appel Paris 1957), reprinted in 25 I.L.R. 228 (head of state immunity bars commercial claims, although such immunity unavailable to a former head of state).

Belgium. The Civil Court of Brussels also recently ruled that a sitting head of state enjoys absolute immunity, irrespective of whether the acts complained of were within his official duties. Mobutu v. S.A. Cotonni, 1989 J.L.M.B. 169, reprinted in 91 I.L.R. 259. In Mobutu, the court reaffirmed that head of state immunity is absolute and separable from the sovereign immunity of states, which has been subject to a commercial activity exception in Belgium since 1879.

India. Although there are few relevant reported cases in India, the available authority strongly suggests that sitting heads of state are entitled to immunity even for commercial activities. See, e.g., Rewa Shankar, et al. v. Narasinghji Maharaj, et al., A.I.R. 1957 Himachal Pradesh 16, summarized in 1957 I.L.R. 229 (1961) (land dispute dismissed on the ground that "no Ruler of a foreign State may be sued in any court otherwise competent to try the action except with the consent of the Central Government").

Germany. In Germany, the restrictive theory of state immunity is well-established, but it is equally clear that lawsuits may not be maintained against sitting heads of state. In In re Honecker, 33 BGHSt 97 (1984), reprinted in 80 I.L.R. 365 (1989), the Federal Supreme Court dismissed a claim for wrongful

deprivation of liberty brought by a former prisoner in East Germany against Erich Honecker, then the Chairman of the Council of State of the German Democratic Republic. The Court ruled that this private action was inconsistent with the complete immunity to which the heads of state in even hostile nations were entitled.

Malaysia. Malaysia similarly retains an absolute version of head of state immunity, despite having adopted the restrictive theory of state immunity. For example, in Village Holdings Sdn. Bhd. v. Her Majesty the Queen in Right of Canada, 2 M.L.J. 656 (1987), reprinted in 87 I.L.R. 223 (1992), the Supreme Court of Malaysia dismissed a suit against a sitting head of state, even though it involved residential real estate located in Malaysia. "[W]hen it comes to the question of impleading a foreign sovereign who declines to submit" even with respect to local property, absolute immunity applies. Id. at 238. Three years later, the Supreme Court of Malaysia adopted the restrictive theory of state immunity, but left undisturbed the head of state immunity announced in Village Holdings.

United Kingdom and Commonwealth Nations. It is true that some states, for example the British Commonwealth nations, have enacted statutes expressly limiting the otherwise applicable rule

of international law that affords absolute immunity to sitting heads of state. Generally, these nations conflate the concepts of head of state immunity and sovereign immunity: to the extent that foreign nations do not receive immunity for commercial activities, sitting heads of state receive no immunity for similar acts. Although cases are common in which states or their agencies or instrumentalities have been sued for their commercial acts, we have discovered no decision in which a sitting head of state was actually subjected to an analogous exercise of power even in those jurisdictions that have statutorily limited the scope of head of state immunity.

The United States has enacted no legislation comparable to that of the Commonwealth nations on head of state immunity. This reflects the fact that there is sound reason to afford broader immunity to a head of state than to the foreign state itself. Indeed, the immunities from civil claims afforded to the President of the United States are far broader than those afforded the United States itself, because "diversion of his energies by concern with private lawsuits would raise unique risks to the effective function of government." Nixon v. Fitzgerald, 457 U.S. 731, 751 (1982). This is even more true in the case of a foreign head of state who would be called upon to

defend proceedings conducted far away, in a foreign language and subject to unfamiliar procedures.

VII. Effect of Grand of Head of State Immunity on U.S.  
Banking System

We were asked to address the question of whether "a grant of head of state immunity [would] set a bad precedent as far as protecting the safety and soundness of our banking system." We believe that granting head of state immunity to the U.A.E. President and his family in accordance with customary international law would have no effect on the safety and soundness of the U.S. banking system, for the reasons set forth below.

First, the Federal Reserve has not alleged that our clients ever sought to exercise control over First American. The 12 percent share interest of H.H. Sheikh Zayed, the 10 percent interest of H.H. Sheikh Khalifa, and the 6 percent interest of ADIA in CCAH were fully disclosed to the Federal Reserve in applications and annual filings made by First American. One fact never disputed in the trial of Robert Altman by either the defense or the prosecution was that these shares were purchased with our clients' own funds, which were always at risk. The record makes clear that once our clients learned of the illegal

nominee arrangements whereby BCCI controlled most of the CCAH shares, they promptly disclosed these arrangements to the Federal Reserve and cooperated with the Board in its efforts to sever any links between BCCI and CCAH.

In addition, realizing that they were the only source of legitimate financial support to First American because the other equity holders had largely been funded by BCCI, the Ruling Family acted responsibly to save First American from financial ruin. Indeed, in order to protect their legitimate investment and to avert a disaster in the U.S. banking system, they went beyond any requirement imposed by U.S. law and acted as a lender of last resort for First American for a two-year period. Similarly, H.H. Sheikh Zayed, H.H. Sheikh Khalifa, and ADIA went far beyond any requirement that U.S. law might impose by volunteering to place their shares in trust to enable a more prompt disposition of First American.

At every step of the way, the actions taken to support First American were coordinated with senior Federal Reserve officials and First American management.

Second, if, unlike our clients' passive, minority investment in First American, a foreign head of state were to seek to acquire control of an insured U.S. bank, he would, like

any other individual, be required to comply with the Change in Bank Control Act (the "CBC Act"). The CBC Act regulates the acquisition by an individual of the power, directly or indirectly, to direct the management and policies of, or to vote 25 percent or more of any class of voting securities of, an insured bank. The CBC Act requires that the appropriate federal bank regulatory agency be given 60 days' prior written notice of any proposed change in control subject to the Act's requirements. The appropriate federal bank regulatory agency is then required to conduct an investigation of all applicants and to publish notice of and solicit comment on a proposed acquisition.

The CBC Act provides for the disapproval of a proposed acquisition if the federal bank regulatory agency has concerns about the financial condition, confidence, experience, or integrity of the acquiring person, if the acquiring person fails to furnish all required information, or if it determines that the acquisition would adversely affect the federal deposit insurance funds. The appropriate federal bank regulatory agency would have the authority to, and presumably would, condition its approval of the acquisition of control of a U.S. bank by a head of state on his agreement to waive his immunity with regard to enforcement

actions that might be brought by such agency in connection with his ownership of the U.S. bank.

That is not this case. Here, the only bad precedent that could possibly be set is one that would permit First American's wholly unfounded civil suit to proceed against the U.A.E. President and his family members. Failure to recognize their sovereign status would send a catastrophic message to friendly nations and their leaders around the world -- your cooperative and voluntary efforts to address matters of concern to the United States will not be reciprocated and your sovereignty will not be respected.

#### VIII. Conclusion

First American has sued the Abu Dhabi Ruling Family and others for \$1.5 billion in alleged damages. We have moved to dismiss that action on the grounds that, if anyone was injured by the secret BCCI shareholding in First American, it was H.H. Sheikh Zayed and our other clients. We have also invoked the protection afforded by U.S. law to a foreign head of state. We are confident that the court will decide these questions in accordance with law and that First American's brazen effort to avoid repaying our clients the over \$200 million in debt incurred by its management will fail.

DRAFT

## TESTIMONY OF JOSEPH W. DELLA PENNA

BEFORE

THE COMMITTEE ON BANKING, FINANCE, AND URBAN AFFAIRS

UNITED STATES HOUSE OF REPRESENTATIVES

DECEMBER 9, 1994

*Introduction*

I have been invited by the House Banking Committee to address several questions regarding the claim of "head of state immunity" on behalf of Sheikh Zayed ibn Sultan, the President of the United Arab Emirates, and certain other Sheikhs who are emirs of specific states within the United Arab Emirates and certain agents who acted on their behalf. This request results, at least indirectly, from the suit recently initiated between First American Corporation and the Sheikhs alleging a pattern of fraudulent transactions involving the Sheikhs through their instrumentality, the Bank of Credit and Commerce International.

I have not reviewed that case or the evidence relevant to that case, other than certain documents raising and responding to the claim of head of state immunity. I venture no opinion on the merits of the claims, nor on such questions as whether a court in the United States has personal jurisdiction over the claim, whether the defendants other than heads of state would be entitled to the defense of foreign sovereign immunity, or whether a court in the United States is bound, because of the Act of State

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Doctrine, to treat the acts of the Sheikhs or their agents as valid and proper.<sup>1</sup>

My testimony opens with a brief summary of my qualifications to speak on the topic of head of state immunity. I will then address three subjects posed by Henry Gonzalez, as Chairman of the Committee:

1. The history of the head of state immunity;
2. Precedents relating to extending head of state immunity to commercial enterprises such as banking; and
3. How the recognition of head of state immunity in commercial settings would affect American commerce with foreign heads of states.

Finally, I will summarize with a few observations on the present process and suggestions about whether there ought to be a legislative response to the problem of head of state immunity.

#### *My qualifications*

I am Professor of Law at Villanova University, in Villanova, Pennsylvania. I have been admitted to the practice of law in the state of Michigan for 25 years and also am duly admitted to practice before the Supreme Court of the United States. I have taught at law schools in the United States and abroad for 23 years. My resumé is attached.

<sup>1</sup> For a thorough review of the Act of State Doctrine, see Joseph Dellapenna, *Deciphering the Act of State Doctrine*, 35 VILLANOVA L. REV. 1 (1990).

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I have practiced, taught, and written about transnational litigation, including having practiced both inside and outside the United States and having been selected as a Fulbright Professor three times (the maximum allowed). My book, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS (The Bureau of National Affairs: Washington, DC 1988) has been described as the "bible" for litigation under the Foreign Sovereign Immunities Act of 1976 (the "Immunities Act").<sup>2</sup> In *Saudi Arabia v. Nelson*,<sup>3</sup> the most recent Supreme Court decision involving the Immunities Act, my book was cited by both Justice Souter (writing for the majority) and Justice Stevens (writing in dissent) as authoritative for the interpretation of that Act.

I am currently co-chair the Committee on International Litigation of the Section of International Law and Practice of the American Bar Association, and have spoken on suits against foreign states at numerous panels of the American Bar Association, the American Society of International Law, and other organizations. I was also a featured speaker at an American Bar Association National Institute on "Frontiers of European Litigation" where I spoke on the doctrines of foreign state immunity as followed by European Courts. I am the founding editor of *Suing Foreign States*, the newsletter of the Committee on International Litigation which I now co-chair.

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<sup>2</sup> Book Review, 22 VANDERBILT J. TRANSNAT'L L. 1029, 1031 (1989).

<sup>3</sup> 113 S. Ct. 1471, 1476, 1488 n.2 (1993).

My experience in the practice of law has been highly varied, focusing in recent years on consulting or otherwise participating in litigation under the Immunities Act. Most notably, I served as co-counsel for the family of Raoul Wallenberg in litigation brought in an attempt to obtain information about his disappearance.<sup>4</sup> In my capacity as an expert on the Immunities Act, I was retained about one year ago by an English barrister, Musa Mazzawi, to prepare an affidavit giving my opinion on the validity of a judgment entered in the United States against the United Arab Emirates. MCI, the holder of the judgment, was seeking enforcement the judgment in England, and Mr. Mazzawi had been retained by the Emirates to resist enforcement. Based in part on my affidavit, the English court stayed its proceedings to enable the Emirates to attempt to have the judgment vacated in the United States. I was not involved in any further proceedings, and have no knowledge of the outcome.

My teaching interests have centered on the fields of international law, contracts and commercial law, and environmental law. I have taught several courses relevant to the concerns before the Committee today, including Commercial Transactions, Conflicts of Law, Contracts, International Trade Law, Public International Law, Remedies, Secured Transactions, and Transnational Litigation.

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<sup>4</sup> Von Dardel v. U.S.S.R., 623 F. Supp. 246 (D.D.C. 1985), vacated, 736 F. Supp. 1 (D.D.C. 1990).

Dellapenna--Head of State Immunity-

**Is there a doctrine of head of state immunity?**

The idea of a special doctrine of immunity for the heads of foreign states separate from the immunity of the foreign state itself is a rather recent phenomenon. Historically, no such notion could exist because the head of a state was thought to be the state, a perspective summarized in the famous quip of King Louis XIV of France, "L'état, c'est moi." We find this attitude expressed not only in the courts of monarchy's, but even in courts in the United States and other republics. Thus, Chief Justice Marshall, in the case that gave rise to the modern law of foreign sovereign immunity both in the United States and internationally (*The Schooner Exchange v. McFadden*),<sup>5</sup> wrote thusly:

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of this nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

Marshall went on in this highly personal vein throughout the opinion. With the literal fall of empires in twentieth century, the continuation of the identification of a monarch or other head

<sup>5</sup> 11 U.S. (7 Cranch) 116, 137 (1812).

of state with the state itself was no longer meaningful, and the practice gradually fell in general disuse. Nevertheless, the personification of a state in the form of a personal sovereign apparently continues to this day in the courts of the British Commonwealth, at least when the suit is against a state headed by a monarch.<sup>6</sup> In such a case, where the suit is genuinely against the state with the personal sovereign named only as a pleading device, a holding regarding the immunity of the head of state is indicative not of any special immunity for the person or the office as it is of the immunity of the state itself.

Curiously, the older tradition of treating the state as an expression of the person of the sovereign continues to echo in our own practice, at least in the title of statute that controls whether a claim of immunity on behalf of a foreign state will be recognized in the United States: the *Foreign Sovereign Immunities Act*. In the United Kingdom and elsewhere in the British Commonwealth, where the practice of personification seems more entrenched, their corresponding statutes are termed *State Immunity Acts*,<sup>7</sup> a title that more accurately expresses the focus of the statutes. Despite the title of the statutes, however, our *Immunities Act* does not address the question of immunity for foreign heads of state (foreign sovereigns, if you will), while the

<sup>6</sup> See, e.g., *Village Holdings Sdn Bhd v. Her Majesty the Queen in Right of Canada* [1988] 2 M.L.J. 656 (High Ct. Malaysia), reprinted in 87 INT'L L. REP. 223 (1992); *Rahimtools v. Nizam of Hyderabad* [1958] A.C. 379 (H.L.), reprinted in 24 INT'L L. REP. 175 (1957).

<sup>7</sup> See, e.g., the [British] *State Immunity Act*, c. 33 (1978), reprinted in 17 INT'L LEG. MAT'LS 1123 (1979).

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British statute does. The British State Immunity Act defines a foreign state as including the sovereign or other head of the State<sup>8</sup> as well as the government of the state and related institutions and entities.<sup>9</sup>

The divorce of the personal sovereign from the concept of the state presented a problem to governments and their courts. Traditionally, the claim to exercise jurisdiction over the person of a foreign sovereign was considered a *casus belli*, and while such an extreme response was not likely by the twentieth century, neither was a claim of jurisdiction over a foreign head of state likely to cement good relations between states. Furthermore, it appeared anomalous to accord a diplomatic representative of a foreign head of state a near absolute immunity while denying a like immunity to the head of state himself or herself.

So long as American courts accorded foreign states absolute immunity from suit, courts in the United States courts apparently were ready to draw upon the two strands of state immunity and diplomatic immunity to craft a rule of absolute immunity for foreign heads of state. The claim of immunity on behalf of a foreign head of state arose extremely rarely however, and we should perhaps refer to it as a notion rather than a doctrine. Apparently, only two American cases actually endorsed the notion prior to 1976, when the Foreign Sovereign Immunities Act was adopted:

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<sup>8</sup> *Id.*, §§ 14(1)(a), 20.

<sup>9</sup> *Id.*, §§ 14(1)(b), (c), 14(2).

*Kendall v. Kingdom of Saudi Arabia*;<sup>10</sup> and *Psinakis v. Marcos*.<sup>11</sup> The *Kendall* suit itself was highly ambiguous; brought against the Kingdom rather than the King, the plaintiff sought to obtain jurisdiction by attaching property that allegedly belonged to the King. In the *Psinakis* case, the court dismissed a libel action against the President of the Philippines for calling an opponent of the government a terrorist; the case thus directly supports the notion of immunity. One other case sometimes cited as supporting the notion of head of state immunity, *Chong Boon Kim v. Kim Yong Shik*,<sup>12</sup> actually involved a suit against a visiting foreign minister who was served with process while on an official visit. The *Chong Boon Kim* case actually seems to involve diplomatic immunity rather than head of state immunity.

None of these were regularly reported, and together they provide at most thin authority for the proposition that foreign heads of state are immune from civil actions in courts of the United States. Nor did the State Department pay the matter any greater attention. The famous Tata Letter, that inaugurated the restrictive rule of foreign sovereign immunity for American courts, did not even mention the question of any personal immunity of foreign sovereigns.<sup>13</sup>

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<sup>10</sup> 1977 DIGEST OF U.S. PRACTICE IN INT'L L. 1053 (S.D. N.Y. 1965).

<sup>11</sup> 1975 DIGEST OF U.S. PRACTICE IN INT'L L. 344 (N.D. Cal. 1975).

<sup>12</sup> (Haw. Cir. Ct.), summarized in 58 AM. J. INT'L L. 186 (1964).

<sup>13</sup> Letter of Acting Legal Adviser Jack Tate to Acting Attorney General Philip Perlman (May 19, 1952), reprinted in 26 DEP'T STATE BULL. No. 678, at 984-85 (1952).

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The practice in courts abroad was only somewhat more definite than these few American precedents, although the foreign decisions are hardly more numerous. After separating out those suits in which the sovereign was named but the suit was really against the state,<sup>14</sup> the foreign precedents are not greatly more numerous than in the United States. They are uniformly narrow in their scope and cautious in their tenor.

The earliest case usually cited as supporting a claim of personal immunity for a head of state is *Duke of Brunswick v. King of Hanover*.<sup>15</sup> Although the Duke raised this claim, the court rather pointedly decided the case on other grounds, grounds that would become the British version of the Act of State doctrine.<sup>16</sup> Similarly inconclusive is a judgment from India that did announce a rule of absolute immunity for heads of state involved in property disputes.<sup>17</sup> Although the Indian court declared that the immunity arose from international law because the Indian Code of Civil Procedure was merely declarative of international law, the immune party was not even a head of state as his "state" had been absorbed by the Indian Union after India became

<sup>14</sup> See, e.g., *Village Holdings Sdn Bhd v. Her Majesty the Queen in Right of Canada* (High Ct. Malaysia 1987), 87 Int'l L. Rep. 223 (1992); *Rahimtoola v. Nizam of Hyderabad* (H.L. 1957), 24 Int'l L. Rep. 175 (1957).

<sup>15</sup> 2 H.L. Cas. 1 (1848).

<sup>16</sup> See David Lloyd Jones, *Act of Foreign State in English Law: The Ghost Goes East*, 22 Va. J. INT'L L. 434, 437-40 (1982); Michael Singer, *The Act of State Doctrine in the United Kingdom*, 75 AM. J. INT'L L. 283, 284-85, 289-91 (1981).

<sup>17</sup> *Rewa Shankar v. Narasinghji Maharaj*, A.I.R. 1957 Himachal Pradesh 16, reprinted in 24 INT'L L. REP. 229 (1957).

independent. When a French court declared the principle of immunity for heads of state, it did so in a case involving a former head of state whom the court declared had lost his immunity by losing his throne.<sup>18</sup>

Only a few foreign cases have actually dismissed a suit based on a plea of immunity for foreign heads of state. English courts have in fact accorded immunity to foreign heads of state in a sparse line of cases dating back to the nineteenth century.<sup>19</sup> More recently, a court of the German Federal Republic accorded head of state immunity to Eric Honecker, then Chairman of the Council of State (i.e., President) of the German Democratic Republic in a suit brought by man who had been held prisoner in eastern Germany; the plaintiff claimed an unlawful deprivation of liberty.<sup>20</sup> A Belgium court even more recently indicated that President Mobutu of Zaire was absolutely immune from suit in Belgium in a case arising out of the expropriation of property in Zaire.<sup>21</sup> The court went on to hold, however, that there was no basis in the case for holding him to be personally liable.

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<sup>18</sup> Decision of 11 April 1957 (*Ex-King Farouk v. Christian Dior, S.A.R.L.*), 84 Clunet 717 (Cour d'appel, Paris, 1957), reprinted in 24 INT'L L. REP. 228 (1957).

<sup>19</sup> *Sayce v. Ameer Ruler Sadig Mohammed Abbasi*, [1952] 2 Q.B. 390 (C.A.); *Mighel v. Sultan of Johore*, [1894] 1 Q.B. 149; *De Haber v. Queen of Portugal*, [1851] 17 Q.B. 171.

<sup>20</sup> Decision of 14 Dec. 1984 (*in re Honecker*), 33 BGHSt. 97 (1984), reprinted in 80 INT'L L. REP. 365 (1989).

<sup>21</sup> Decision of 29 Dec. 1988 (*Mobutu v. SA Cotonni*), 1989 Jurisprudence de Liège, Mons et Bruxelles ("JLMB") 169, reprinted in 91 INT'L L. REP. 259 (1993).

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These recent decisions abroad employing the doctrine of foreign state immunity have parallels in the United States after the enactment of the Foreign Sovereign Immunities Act in 1976. In the upsurge of litigation against foreign states and foreign-state-related entities that followed the enactment of the Immunities Act, a rather remarkable number of suits (given the prior dearth of such suits) have been filed against heads of foreign states since 1976. Several American courts have accepted the claim of immunity for a foreign head of state, but none have given any real analysis to the subject.

In most of the cases, the court simply deferred to a suggestion of the State Department that it accord immunity to the foreign head of state.<sup>22</sup> By means of such suggestions, "head of state immunity" has been extended to the a prime minister rather than a head of state<sup>23</sup> and even to the wife and other family mem-

<sup>22</sup> *O'Hair v. Wojtula*, reported in 1979 Digest of U.S. PRAC. IN INT'L L. 897 (D. D.C. 1979); *Anonymous v. Anonymous*, 581 N.Y.S.2d 776 (App. Div. 1992) (divorce). In two cases, a court appeared to defy a suggestion of immunity by the State Department. The first involved a subpoena served on the Solicitor General of the Philippines while in the United States on official business. While the court rejected the claim of head of state immunity for the Solicitor General, it accepted as binding the equally dubious suggestion that the Solicitor General was entitled to diplomatic immunity. *Republic of the Philippines v. Marcos*, 665 F. Supp. 793 (N.D. Cal. 1987). The second involved a decision by a bankruptcy court to permit a trustee-in-bankruptcy to "abandon" certain claims to the claimant when the claims would be made against, among others, the President of Egypt. The court was careful, however, to indicate that it was not passing on the merits of the immunity claim but simply did not consider itself to be the proper forum to determine the claims. *In re Wilson*, 94 B.R. 886 (E.D. Va. 1989).

<sup>23</sup> *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990). Other government officials have been held to be shielded under the Foreign Sovereign Immunities Act

bers of a head of state.<sup>24</sup> When the State Department has declined to suggest head of state immunity, on the other hand, our courts have rejected such claims.<sup>25</sup>

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when they acted on behalf of the foreign state. See, e.g., *Risk v. Halvorsen*, 936 F.2d 393 (9th Cir. 1991), cert. denied sub nom. *Risk v. Norway*, 112 S. Ct. 880 (1992); *Chuidian v. Philippines Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990); *Herbages v. Meese*, 747 F. Supp. 60 (D. D.C. 1990), aff'd mem., 946 F.2d 1564 (D.C. Cir. 1991); *Fickling v. Commonwealth of Australia*, 775 F. Supp. 66 (E.D. N.Y. 1991); *Kline v. Kaneko*, 685 F. Supp. 386 (S.D. N.Y. 1988); *Rios v. Marshall*, 530 F. Supp. 351 (S.D. N.Y. 1986). See also *Jaffe v. Miller*, 73 D.L.R.4th 420 (Ont. High Ct. 1990), reprinted in 87 INT'L L. REP. 197 (1992). See generally JOSEPH DELAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS § 1.8 (1988).

<sup>24</sup> *Kilroy v. Windsor*, reported in 1978 DIGEST OF U.S. PRAC. INT'L L. 641 (N.D. Ohio 1978), reprinted in 81 INT'L L. REP. 127 (1990) (Charles, Prince of Wales); *Kline v. Kaneko*, 535 N.Y.S.2d 303 (N.Y. Cnty. Sup. Ct. 1988), aff'd mem. sub nom. *Kline v. Cordero de la Madrid*, 546 N.Y.S.2d 506 (App. Div. 1989) (wife of President of Mexico, sued for alleged involvement in kidnapping). Without the benefit of State Departments suggestions, courts both here and abroad have rejected immunity for family members. In re Estate of Ferdinand Marcos Human Rts. Litigation, 978 F.2d 493 (9th Cir. 1992), cert. denied sub nom. *Marcos-Manotoc v. Trajano*, 113 S. Ct. 2960 (1993) (no immunity for the daughter of Ferdinand Marcos who had acted on her own behalf); *Decision of 29 Dec. 1988 (Mobutu v. SA Coton)*, 1989 JLM 169, reprinted in 91 INT'L L. REP. 259 (1993). When an American court analyzed such a claim on its own under the Immunities Act, it rejected a claim of immunity for a state immunity in a suit based upon the actions of a son of a diplomatic. *Skeen v. Brazil*, 566 F. Supp. 1414 (D. D.C. 1983).

<sup>25</sup> In re Estate of Ferdinand Marcos Human Rts. Litigation, 978 F.2d 493 (9th Cir. 1992), cert. denied sub nom. *Marcos-Manotoc v. Trajano*, 113 S. Ct. 2960 (1993) (no immunity for the daughter of former head of state who had acted on her own behalf); In re Doe, 860 F.2d 40 (2d Cir. 1988) (former head of state defying grand jury subpoena); *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1987), cert. denied, 490 U.S. 1035 (1989) (former head of state sued under RICO); In re Grand Jury Proceedings, 817 F.2d 1108 (4th Cir. 1987) (former head of state defying grand jury subpoena); *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), cert. dismissed sub nom. *Ancor Holdings, N.V. v. Republic of the Philippines*, 480 U.S. 942 (1987) (former head of state sued for fraud); *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993) (former head of state sued for ordering violations of human rights); *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) (former foreign military commander-in-chief convicted

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The practice of leaving the determination of immunity to the State Department reflects the continuing practice regarding claims of diplomatic immunity<sup>26</sup> and the practice regarding claims of foreign state immunity prior to enactment of the Immunities Act.<sup>27</sup> The practice has left the State Department open to continual political pressure to suggest immunity even when, by the relevant legal standards, immunity was not justified, and the State Department often was unable to withstand such pressures.<sup>28</sup>

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for various narcotics offenses); *United States v. Marcos*, No. SSSS 87 Cr. 598 (JFK), 1990 WL 29368 (S.D. N.Y. Mar. 9, 1990) (wife of former head of state facing criminal charges); *Estate of Domingo v. Republic of the Philippines*, 694 F. Supp. 782 (W.D. Wash. 1988) (reversing earlier recognition of head of state immunity after a defendant--Ferdinand Marcos--ceased to be a head of state and the State Department no longer supported immunity), appeal dismissed mem., 895 F.2d 1416 (9th Cir. 1990); *SEC v. Bank of Credit & Comm. Int'l, S.A.*, Civ. No. 78-0469 (D. D.C. Mar. 17, 1978) (regulatory injunction against foreign head of state); *Lasidi, S.A. v. Financiera Avenida, S.A.*, 540 N.Y.S.2d 980 (N.Y. 1989) (claim of testimonial privilege on behalf of foreign head of state rejected when the head of state had initiated the suit and the State Department gave an ambiguous suggestion regarding immunity).

Many of the cases in which the court rejected a claim of immunity with a State Department suggestion were decided in terms of the Act of State doctrine, perhaps because the person claiming immunity was a former head of state (Ferdinand Marcos). The one case in which the court accorded immunity to a former head of state without a suggestion to that effect by the State Department was decided in terms of the Act of State Doctrine rather than under the notion of head of state immunity. *Guinto v. Marcos*, 654 F. Supp. 276 (S.D. Cal. 1986).

<sup>26</sup> See, e.g., *Abdulazziz v. Metropolitan Dade Cnty.*, 741 F.2d 1328 (11th Cir. 1984). See generally the Convention on Diplomatic Relations, signed at Vienna, April 24, 1963, entered into force for the United States, Dec. 13, 1972, 23 U.S.T. 77, T.I.A.S. No. 6820, implemented, 22 U.S.C. §§ 254a-254e.

<sup>27</sup> *Mexico v. Hoffman*, 324 U.S. 30 (1945); *ex parte Peru*, 318 U.S. 578 (1943); *the Navemar*, 303 U.S. 68 (1938). See generally DELAPENNA, *supra* note 23, § 1.2.

<sup>28</sup> See, e.g., *Abdulazziz v. Metropolitan Dade Cnty.*, 741 F.2d 1328 (11th Cir. 1984) (diplomatic immunity); *Flota Maritima*

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The State Department's own dissatisfaction with the results played the major role in leading the Department to draft the Foreign Sovereign Immunities Act to divest itself of this painful responsibility.<sup>29</sup>

What we are left with, then, is an amorphous doctrine whose very existence is not entirely settled and whose reach is almost completely uncertain. While the State Department continues to attempt to control the application of the notion of head of state immunity, at least when the Department's interests would be served by such intervention. Whether courts should be bound by such "suggestions" or should even pay much attention to them is far from clear, although courts certainly seemed inclined to do so.

*Are heads of state immune when acting in a private or commercial capacity?*

Assuming that foreign heads of state are immune, the question then arises as to the extent of that immunity. There would seem to be little dispute that head of state immunity ought to apply to criminal proceedings--at least so long as the head of state continues in office.<sup>30</sup> Similarly, there is little doubt

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*Browning de Cuba, S.A. v. M/V Ciudad de la Habana*, 335 F.2d 619 (4th Cir. 1964) (state immunity).

<sup>29</sup> *Jet Line Services, Inc. v. M/V Marsa el Hariga*, 462 F. Supp. 1165, 1169 (D. Md. 1975); H.R. REP. NO. 94-1487, Sept. 9, 1976, reprinted in [1976] U.S. CODE CONG. & ADM. NEWS 6604, 6606-07; DELAPENNA, *supra* note 23, § 1.2, at 8.

<sup>30</sup> See *In re Doe*, 860 F.2d 40 (2d Cir. 1988); *In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir. 1987); *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990); *United States v. Mar-*

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that the doctrine applies to shield foreign heads of state from civil proceedings arising from the actions of the foreign head of state in an official capacity--also variously termed a public or official capacity.<sup>31</sup> The shield extends to the political head of a foreign state<sup>32</sup> as well as (perhaps) to the family of the head of state.<sup>33</sup> What is singularly lacking, however, are cases where the doctrine has been invoked to protect what could be termed private or commercial acts of foreign heads of state.

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cos., No. SSSS 87 Cr. 598 (JFK), 1990 WL 29368 (S.D. N.Y. Mar. 9, 1990).

<sup>31</sup> See, e.g., *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990). See also *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *In re Estate of Ferdinand Marcos Human Rts. Litigation*, 978 F.2d 493 (9th Cir. 1992), cert. denied sub nom. *Marcos-Manotoc v. Trajano*, 113 S. Ct. 2960 (1993); *Decision of 29 Dec. 1988 (Mobutu v. SA Coton)*, 1989 JLMB 169, reprinted in 91 INT'L L. REP. 259 (1993); *Decision of 14 Dec. 1984 (in re Ho-necker)*, 33 BGHSt. 97 (1984), reprinted in 80 INT'L L. REP. 365 (1989).

<sup>32</sup> *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990) (British Prime Minister).

<sup>33</sup> *Kilroy v. Windsor*, reported in 1978 DIGEST OF U.S. PRAC. INT'L L. 641 (N.D. Ohio 1978), reprinted in 81 INT'L L. REP. 127 (1990) (Charles, Prince of Wales); *Kline v. Kaneko*, 535 N.Y.S.2d 303 (N.Y. Cnty. Sup. Ct. 1988), aff'd mem. sub nom. *Kline v. Cordero de la Madrid*, 546 N.Y.S.2d 506 (App. Div. 1989) (wife of President of Mexico, sued for alleged involvement in kidnapping). Without the benefit of State Departments suggestions, courts both here and abroad have rejected immunity for family members. *In re Estate of Ferdinand Marcos Human Rts. Litigation*, 978 F.2d 493 (9th Cir. 1992), cert. denied sub nom. *Marcos-Manotoc v. Trajano*, 113 S. Ct. 2960 (1993) (no immunity for the daughter of Ferdinand Marcos who had acted on her own behalf); *Decision of 29 Dec. 1988 (Mobutu v. SA Coton)*, 1989 JLMB 169, reprinted in 91 INT'L L. REP. 259 (1993). When an American court analyzed such a claim on its own under the Immunities Act, it rejected a claim of immunity for a state immunity in a suit based upon the actions of a son of a diplomatic. *Skeen v. Brazil*, 566 F. Supp. 1414 (D. D.C. 1983).

Until the late 1950's, the United States followed a rule of absolute immunity for foreign states.<sup>34</sup> Other common law countries did likewise until the 1970's or even later. Decisions from these countries announcing a rule of absolute immunity for foreign heads of state are neither surprising nor particularly helpful in an era of restrictive immunity for foreign states.<sup>35</sup> Even in this era, however, one is struck by how seldom the claim of personal immunity for a head of state was raised in a private or commercial context.

The British State Immunity Act and other statutes modeled on it expressly subject foreign heads of state to the restrictive theory of immunity,<sup>36</sup> so there is no doubt about the outcome in most of the British Commonwealth today. Apparently, in only one case in the United States did the court accord immunity to a foreign head of state in private context--*Anonymous v. Anonymous*.<sup>37</sup> The court there based its decision entirely on deference to a suggestion from the State Department without any independent analysis of whether immunity was appropriate. And, so far as I have been able to determine, no court outside the common law or-

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<sup>34</sup> See generally DELLAPENNA, *supra* note 21, § 1.2.

<sup>35</sup> *Rewa Shankar v. Karasinghji Maharaj*, A.I.R. 1957 Himachal Pradesh 16, reprinted in 24 INT'L L. REP. 229 (1957); *Sayce v. Ameer Ruler Sadig Mohammad Abbasi*, [1952] 2 Q.B. 390 (C.A.); *Mighel v. Sultan of Johore*, [1894] 1 Q.B. 149; *De Haber v. Queen of Portugal*, [1851] 17 Q.B. 171.

<sup>36</sup> The [British] State Immunity Act, c. 33 (1978), §§ 14(1)(a), 20, reprinted in 17 INT'L LEG. MAT'L 1123 (1979).

<sup>37</sup> 581 N.Y.S.2d 776 (App. Div. 1992).

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bit has applied head of state immunity in a private or commercial context in at least the last 30 years.

This brief summary suggests that the doctrine of head of state immunity does not in fact apply to acts by the head of state of a private or commercial nature. Such a conclusion is entirely consistent with the policies underlying the notion that foreign heads of state ought to be immune. The purpose of head of state immunity is two-fold:

1. To avoid embarrassing the executive in the conduct of foreign relations; and
2. To avoid interfering in their conduct of internal political affairs by the heads of foreign states.

There really is no reason to shield high foreign officials from proceedings unrelated to either of the concerns properly related to the notion of head of state immunity. Consider the analogous example of a President of the United States. Surely when the Supreme Court indicated in *Nixon v. Fitzgerald*<sup>38</sup> that even a former President was absolutely immune from suit arising out of the conduct of official duties, the Court would have afforded a sitting President no immunity whatsoever if the litigation had arisen, say, out of a simple breach of contract unrelated to the office of the President save for the person of the defendant.

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<sup>38</sup> 457 U.S. 731 (1982).

While it is true that any litigation against an office holder interferes to some extent with that person's discharge of the duties of office, to shield that office holder behind a claim of immunity works a denial of justice to those wronged by the office holder. Therefore, claims of official immunity, like claims of state or sovereign immunity, always must be balanced against the interests of justice. If in virtually every other context we have concluded that the interests of justice predominate when the state or the office holder descends from the heights of sovereign (or public or official) duty onto the plain of private or commercial activity that the shield of immunity is lost, only one reason appears to treat foreign heads of state any differently. That one reason is the personal affront that arises from the service of process and consequent claim of personal jurisdiction upon a foreign head of state on an official visit.<sup>39</sup>

The proper balance of immunity and amenability to the demands of justice then would be for a foreign head of state (and perhaps former heads of state as well) to be immune for official or sovereign or public acts, but not for private or commercial acts. The foreign head of state would also be immune to personal jurisdiction if (but only if) it is based solely upon personal service of process while in the United States on an official visit. Except for the special immunity from service of process, this rule would be parallel to the immunity of the foreign state

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<sup>39</sup> Review here the analysis of Chief Justice Marshall in *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 137-39 (1812).

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under the Immunities Act. Experience under the Immunities Act has taught us that there is room enough for the play of political concerns in determining what acts are commercial<sup>40</sup> and when they are sufficiently linked to the United States<sup>41</sup> that we need not fear excessive claims of jurisdiction over foreign heads of state.

*How would recognition or denial of head of state immunity in commercial settings affect American commerce?*

At the present time, I can only speculate what the recognition or denial of head of state immunity in commercial settings would affect American commerce. My guess is that the effect would be minor. While it is true that many heads of state are enormously wealthy, they do not invest in the United States solely, or even primarily, because of their expectation of personal immunity. When foreign heads of state invest in the United States, they do so because it is the most secure place for their money. When they buy in the United States, they do so because the United States produces what they are seeking. When they sell to the United States, they do so Americans can afford what the foreign head of state wants to sell.

Indeed, a foreign head of state might find an investment programs hindered if it were generally realized that they could welch on a deal and claim immunity in any subsequent litigation.

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<sup>40</sup> See generally DELLAPENNA, *supra* note 21, §§ 6.3-6.8.

<sup>41</sup> See generally DELLAPENNA, *supra* note 21, §§ 3.6-3.10.

If this were to happen, the head of state would be virtually compelled to waive the immunity expressly in making a significant purchase or investment in the United States. Thus, I suspect that the primary effect of the rule of immunity, whatever it might be, would not be to deflect the flow of commerce or investment, but to alter the bargaining positions of the parties, strengthening the position either the foreign heads of state or the Americans with whom they deal. If the rule accords immunity unless it is waived, the American party will have to pay something for the waiver; if the rule is otherwise, the foreign head of state will have to pay something for an acceptance of immunity (as by a compulsory choice of forum clause choosing a forum where immunity would be the rule). (By pay, of course, I mean the surrender of some advantage or other in the contract terms, and not just the payment of money.)

I am bolstered in my speculation by our experience under the Immunities Act. There is no evidence that the issuance of the Tate Letter<sup>42</sup> adopting the restrictive theory of foreign state immunity for the United States or the subsequent strengthening of that rule by its enactment as the Foreign Sovereign Immunities Act has in any way diminished the international commerce of the United States. Even the threat of the return of illegally expropriate property to its original owners should the property be found in the United States does not seem to have had any effect

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<sup>42</sup> Letter of Acting Legal Adviser Jack Tate to Acting Attorney General Philip Perlman (May 19, 1952), reprinted in 26 Dep't State Bull. No. 678, at 984-85 (1952).

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on the flow of such property into the United States.<sup>43</sup> This would seem to suggest that little, if any, effect would follow from clarifying the head of state immunity doctrine in either direction.

What should be done?

Given the great wealth of many foreign heads of state, it can only be expected that they will play a growing role in the commerce of the United States. While I believe that clarifying the doctrine of head of state immunity in either direction would have little effect on the commerce of or investment in the United States, clarifying the doctrine would have a significant effect on the administration of justice in the probably numerous cases in which the parties deal without agreeing to alter the default rule of either immunity or non-immunity, as the case may be. I have already indicated that I believe the default rule should be that the foreign head of state is not immune in commercial or private dealings. Given the likelihood of political pressures on the Department, the rule I propose is not likely to result from an erratic pattern of State Department suggestions.

Courts actually have precedents they could follow to bring the question of foreign state immunity within the sweep of the Foreign Sovereign Immunities Act. When the Foreign Sovereign Immunities Act was adopted, it not only said nothing about the possible immunities of heads of state, it also said nothing about

<sup>43</sup> See generally DELLA PENNA, *supra* note 21, §§ 3.13, 6.13-6.16, 8.9.

the immunities of international organizations. Nonetheless, courts quickly decided that international organizations under the International Organization Immunities Act<sup>44</sup> were covered by the standards of the Foreign Sovereign Immunities Act.<sup>45</sup> Courts reached this decision based upon the presumed intent of Congress in the face of a silent legislative history. While the same ploy could be applied to foreign heads of state, indeed it has already been employed to protect (and limit the protection) of lesser state functionaries,<sup>46</sup> it is not likely regarding foreign heads of state. The State Department's active opposition through the suggestion mechanism has proven sufficient to prevent courts from simply extending the Foreign Sovereign Immunities Act and, when appropriate, overruling the Department. Probably only Congress could intervene to clarify and normalize the situation.

The question is, then, should Congress act? Frankly, Congress's record in legislating on matters of immunities in foreign relations has not been a happy one. The Immunities Act has been termed "a peculiarly twisted exercise in statutory drafts-

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<sup>44</sup> 22 U.S.C. §§ 288-288(e).

<sup>45</sup> *Tuck v. Pan Am. Health Org.*, 668 F.2d 547 (D.C. Cir. 1981); *Broadbent v. Organization of Am. States*, 628 F.2d 27 (D.C. Cir. 1980). See generally DELAPENNA, *supra* note 21, §§ 1.9, 1.10.

<sup>46</sup> See, e.g., *Chuidian v. Philippines Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990); *Herbage v. Meese*, 747 F. Supp. 60 (D. D.C. 1990), aff'd mem., 946 F.2d 1564 (D.C. Cir. 1991); *Kline v. Kaneko*, 685 F. Supp. 386 (S.D. N.Y. 1988); *Rios v. Marshall*, 530 F. Supp. 351 (S.D. N.Y. 1986). See also *Jaffe v. Miller*, 73 D.L.R.4th 420 (Ont. High Ct. 1990), reprinted in 87 INT'L L. REP. 197 (1992). See generally DELAPENNA, *supra* note 21, § 1.8.

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manship"<sup>47</sup> that has produced a "remarkably obtuse" statute<sup>48</sup> that is "a statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions, has . . . been a financial boon to the private bar but a constant bane to the federal judiciary."<sup>49</sup> These problems seem to me to have resulted from too heavy a reliance on the State Department as the source of the drafting for the legislation; the Department appears to have been guilty of trying to unload a responsibility that had grown unpleasant without carefully attending to the workability of the resulting statute for those who would be charged to apply it.

The simplest response would be for Congress to amend the definition of "foreign state" in the Foreign Sovereign Immunities Act to include the political head of a foreign state.<sup>50</sup> Even this solution would require Congress to decide whether to subsume the head of state under the concept of the foreign state itself or under the concept of an agency or instrumentality of a foreign state,<sup>51</sup> as the two concepts are treated differently in some important respects in the Immunities Act. This approach in effect leaves it to the courts to work out the details with all the po-

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<sup>47</sup> *Chisholm & Co. v. Bank of Jamaica*, 643 F. Supp. 1393, 1398 n.2 (S.D. Fla. 1986).

<sup>48</sup> *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1106 (S.D. N.Y. 1982).

<sup>49</sup> *Id.*, at 1105.

<sup>50</sup> 28 U.S.C. § 1603(a).

<sup>51</sup> *Id.*, § 1603(b).

tential confusions inherent in the present Immunities Act; nor does it deal with the problem of immunity from service of process while on official visits to the United States.

Arguably, a higher degree of certainty is necessary regarding the official immunity of foreign heads of states than for the foreign states themselves. If this is so, Congress should consider enacting an entirely new statute, perhaps modelled after the British State Immunity Act. The British Act provides a shopping of list of fairly specific exceptions to immunity, rather than the sweeping generalities of the Foreign Sovereign Immunities Act that provide little or no real guidance to the courts. The specific approach in practice has provided considerably more certainty in litigation in Britain than our statute has achieved in our courts.<sup>52</sup> Such a statute would also need to address such questions as to the extent to which head of state immunity would extend, if at all, to families of heads of state, lesser officials of a foreign state, or former heads of state. A specific section might discuss the special problem of criminal proceedings against sitting or former heads of state.

On that happy note, I close.

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<sup>52</sup> See Joseph Dellapenna, *Foreign State Immunity in Europe*, 5 N.Y. INT'L L. REV. 51 (1992).

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Courses taught: Managing the Water Environment (19 years); Contracts (18 years); Conflict of Laws (18 years); Public International Law (11 years); Admiralty (8 years); Environmental Law (6 years); Legal Education Seminar (5 years); Transnational Litigation (4 years); Chinese Law (4 years); Legal Writing (4 years); International Trade Law (3 years); Comparative Law (3 years); Torts (3 years); Commercial Transactions (2 years); Secured Transactions (2 years); Law of the Sea (2 years); Remedies (1 year); Natural Resources Law (1 year); Ocean and Coastal Management Law (1 year)

**Co-Chair**

Subcommittee of the Model Water Code Task Force of the American Society of Civil Engineers to draft a "regulated riparian" version of a model water code intended for adoption in eastern states (1992 - present)

Shared the leadership with a civil engineer of a working group of five engineers and lawyers to complete work begun three years earlier when a decision was made that the two parts of the United States would need different model codes

**Consultant**

With the Associates for Middle East Research, Inc. (1986 to present), and at the Middle East Research Institute of the University of Pennsylvania (1983-1986)

Consulted and prepared published texts on international and comparative legal aspects of water management in the Middle East as part of an interdisciplinary team; gave oral presentations at seminars and conferences

**Delegation Leader**

For the People to People International Citizen Ambassador Program (1992)

Led a delegation of seven lawyers to the People's Republic of China to consult on the Three Gorges Dam project

**Attorney**

For the American Academy of Medical Ethics (1989 to present), and for the Association for Public Justice (1989), and for the Value of Life Committee, Inc. (1989, 1991)

Wrote *amicus* briefs for the U.S. Supreme Court for the cases of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *Hodgson v. Minnesota*, *Turnock v. Ragsdale*, and *Webster v. Reproductive Health Services* (and to other courts in other cases), presenting the history of abortion under English and American Law and arguing its relevance to the modern controversy

**Fulbright Senior Researcher in Law**

At the Directory-General of Natural Resources, the Ministry of Planning, Republic of Portugal (1990)

Advised Portuguese officials on transboundary domestic water management problems and the reform of Portugal's domestic water laws

**Attorney**

For the family of Raoul Wallenberg (1983-1990)

One of a group of attorneys who secured a judgment on behalf of the Swedish diplomat seeking a definite accounting of where he is, his release if he still lives, and damages for his wrongful imprisonment or death, *von Dardel v. U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985); while the judgment was later vacated, 736 F. Supp. 1 (D.D.C. 1990), the Soviet government has undertaken to open its records to the family regarding Mr. Wallenberg's fate

**Consultant**

In the People's Republic of China (1987-1989), and the Republic of China (1979-1983)

Presented oral and written reports to government departments and to business enterprises [I am conversationally fluent in written and spoken Chinese (Mandarin)]

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At Jilin University, Changchun, Jilin Province, People's Republic of China (1987-1988); and National Chengchi University, Taipei, Taiwan Province, Republic of China (1978-1979)

Courses taught: American Environmental Law (2 years); Anglo-American Contract Law (2 years); International Trade (1 year); Law of the Sea (1 year); Private International Law (1 year); and Selected Problems in American and Chinese Law (1 year)

**Consultant**

To Unysia Corp. (1987)

Consulted on recent developments in law of contracts, particularly the sale or leasing of computers

**Director of Legal Writing Programs**

At Villanova University (1982-1986, 1989); the University of Cincinnati (1974-1975); and Willamette University (1972-1973)

Designed new programs involving the recruitment and supervision of instructors teaching research and writing for up to 250 students

**Traveling Humanist**

Lecturing to public groups as a member of the Invitational Humanist Program of the Pennsylvania Humanities Council (1982-1983)

Topics included "environmental ethics," and "legislating morality," and "the impact of changing technologies on law"

**Director**

Self-Study on the Impact of the Federal Government on Villanova University, in cooperation with the Alfred P.

Sloan Foundation National Commission on Government and Higher Education (1977)

Supervised and coordinated self-studies by the 15 highest-level administrators at Villanova University while reporting directly to the university's President; prepared the final report (150 pages) submitted to the Foundation

Director

1976 Ohio Valley CLEO Summer Institute

Administered funds drawn from a federal grant and a consortium of seven law schools; designed the program; recruited faculty (4), staff (5), and students (31); supervised the program; and placed all students in J.D. programs who successfully completed the program (30 of 31) (no other institute that year placed all of its students without intervention from Washington)

Of Counsel

To the firm of DeGennaro & Corman (now Johnson & DeGennaro), Bloomfield Hills, Michigan (1971-1975)

Handled appeals, most notably: McCune v. Grimaldi Buick-Opel, Inc., 45 Mich. 472, 206 N.W.2d 742 (1973)

Co-director

Cry of Love Legal Clinic, Salem, Oregon (1972-1973)

Established a free legal clinic in connection with a free medical and counselling clinics; supervised 12 students in client contact and representation for which the students received academic credit

Research Associate

Program of Policy Studies in Science and Technology, George Washington University (1970)

Researched legal aspects of airport development as part of an interdisciplinary team under a contract with the Federal Aviation Administration to evaluate the environmental impact of proposals to develop general aviation services

Attorney-Advisor (General)

National Aeronautics and Space Administration, Washington, D.C. (1969)

Primarily responsible for legal problems concerning Apollo XI and Space Nuclear Applications

**Instructor**

Detroit Institute of Technology (1966-1968)

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Bar of the Supreme Court of the United States	American Association for Interdisciplinary Research in Values and Social Change
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American Law Institute	Association for Chinese Studies
International Bar Association	Fulbright Association
International Law Association	International Water Resources Association
World Jurists Association	Lawyers' Alliance for World Security (formerly Lawyers' Alliance for Nuclear Arms Control)
American Society of International Law	Phi Kappa Phi
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American Bar Association, Committee on International Litigation, Section on International Law and Practice, Chair (1993 - present), Vice-Chair (1990 to 1993)

American Bar Association, Suing Foreign States, Newsletter of the Committee on International Litigation, Section on International Law and Practice, Founding Editor (1990 - present)

American Bar Association, Committee on Foreign Sovereign Immunity, Section on International Law and Practice, Vice-Chair (1986 - 1990) (merged into Committee on Litigation)

American Bar Association, Committee on Water Resources, Section of Natural Resources, Energy, and Environmental Law (1988 - present)

American Law Institute, Consultative Group on the Restatement of the Law, Third, of Unfair Competition (1985 - 1993)

American Law Institute, Consultative Group on the Uniform Commercial Code (1986 - present)

American Society of Civil Engineers, Model State Water Code Task Committee (1990 - present)

American Society of Civil Engineers, Regulated Riparian Model Code Subcommittee, Model State Water Code Task Committee, Chair (1992 - present)

American Society of International Law, Chair of the Pacific Region Interest Group (1993 - present)

Eastern Mineral Law Foundation, Teachers Committee (1985 - present)

Eastern Mineral Law Foundation, Scholarship Committee (1986 - present)

International Law Association, Water Resources Committee, Consultant (1992 - present)

International Law Association, Water Resources Committee, Working Group on Cross-Media Pollution (1993 - present)

International Law Association, American Branch, State Immunity Committee, Chair (1993 - present)

Lawyers' Alliance for Nuclear Arms Control, Philadelphia Chapter Board of Governors (1984-1987)

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 manuscript due in 1992 (one of approximately 13 volumes in  
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**WATERS AND WATER RIGHTS**  
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**SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS**  
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 Georgetown University Press 1987) (coauthor)

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- The Republic of China's Claims Relating to the Territorial Sea, Continental Shelf, and Exclusive Economic Zones: Legal and Economic Aspects, 3 B.C. INT'L & COMP. L. REV. 353-76 (1980) (with Ar-Young Wang)
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*The Philippines Territorial Water Claim in International Law*, 5 G.W. J.L. & ECON. DEV. 45-61 (1970)

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A Middle Ground on Abortion, CHRISTIANITY & CRISIS, Mar. 31, 1980, p. 70

The U.S. Isn't a Leader in International Law, PHILA. INQUIRER,  
Feb. 12, 1980, p. 13A, col. 2

Abortion: Facing Realities, N.Y. TIMES, Dec. 15, 1979, p. 27,  
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AFFAIRS OF THE UNITED STATES HOUSE OF REPRESENTATIVES

DECEMBER 9, 1993

My name is Adil Elias. I am a citizen of the Sudan residing in the United States. I hold a Ph.D. in Mechanical Engineering from the University College of London with a speciality in the field of automotive air pollution. My career has included inventing patented devices, lecturing at the University of Khartoun, and publishing many papers for international conferences in my field of engineering.

I am Chairman of the BCCI Depositors' Protection Association (DPA). I represent depositors whose losses in the BCCI fraud exceed \$1 billion. In my case, and in the case of many of our members, we lost our substantial deposits because of the very specific representation of BCCI's managers that Abu Dhabi stood firmly behind BCCI, would give us all of the support needed in the face of a crisis, and that, with the support of Abu Dhabi as one of the world's richest nations, BCCI was assured to become one of the strongest banks in the world's financial community.

Since the disaster known as Black Friday descended upon us on July 5, 1991, I have been actively involved in seeking to

recover for my fellow depositors and myself those funds which were wrongfully taken from us. In pursuit of our rightful claims, we have stated our interest in the American lawsuit filed by the First American Corporation and others against Sheikh Zayed Bin Sultan Al-Nahyan and members of his family in the Federal Court in Washington, D.C. As victims of the fraudulent failure of BCCI, we view the First American lawsuit as a source for the recovery from the Abu Dhabi defendants of a portion of the money we have lost. Because at least half of the plaintiffs' recovery in this case will inure to the benefit of us who have been victimized, this lawsuit may represent our best hope to date for any recovery. A finding against the Abu Dhabi defendants in the United States may also have precedential value in other litigation we contemplate will be brought against the Abu Dhabi defendants in the victims' continuing effort to make themselves whole.

All of this is at risk of being undone if the United States government, which has vigorously prosecuted BCCI in this country, decides that one of BCCI's most important conspirators should be immune from suit in this country. Just as we believe that great benefit to our cause would be derived, both directly and indirectly, from an adjudication against the Abu Dhabi defendants in the U.S., the spectre of an adverse ruling, that is, one in favor of Head of State immunity for the Abu Dhabi

defendants, could have a disastrous precedential effect on other litigation we contemplate bringing against these defendants elsewhere in the world. Since the essential character of all of the transactions that led to our losses was private and financial in nature, it is our urgent hope that the United States government recognizes that to be the case, and declines to accord improperly an immunity to these wrongdoers that would operate not only as a shield from liability, but a sword by which to dash our hopes for a recovery of our losses.

I am advised that the question of immunity, as a legal matter, is not even a close one. The Abu Dhabi defendants have waived their sovereign immunity by having applied for recovery of funds from First American's trustee in an amount in excess of \$230 million. These people are not victims. They are wrong-doers. They are entitled to nothing and should be obligated to make restitution to those whom they have so devastatingly injured. This is not simply a dispute between institutions. Real people have been grievously harmed. The United States government should not prevent us from vindicating our rights.

**THE GENEVA AGREEMENT**

One month after the date of this hearing, Sheikh Zayed and the other members of Abu Dhabi's ruling family reached an agreement with First American Bankshares, First American Corporation, the Federal Reserve, the Department of Justice, and the New York County District Attorney's Office.

In return for First American's promise not to press the civil suit against members of Abu Dhabi's ruling family and U.S. prosecutors' promise not to pursue any criminal charges against the family, the family agreed to give up its claims to the \$400 million that it had invested in First American. Half of this money will go to the U.S. Treasury and the other half will go to depositors of BCCI around the world who lost money when the bank was shut down in 1991. In addition, the royal family agreed for the first time to provide U.S. prosecutors with access to several witnesses and thousands of documents located in Abu Dhabi.

The following two documents provide more specific details. The first is the Geneva Agreement signed by the aforementioned parties on January 8, 1994. The second is an implementing agreement filed in U.S. District Court on January 21, 1994.

## AGREEMENT

This Agreement dated January 8, 1994, including Exhibits A-E attached hereto and incorporated by reference herein, embodies all promises, understandings, and agreements in existence among the Abu Dhabi parties (as defined below), the United States Department of Justice ("DOJ"), the New York County District Attorney's Office ("DANY"), and the Board of Governors of the Federal Reserve System ("Board"), and certain promises, understandings and agreements with First American Corporation ("FAC"), the trustee of FAC appointed by the United States District Court for the District of Columbia pursuant to the Order Appointing Trustee entered June 23, 1992 ("FAC Trustee"), and First American Bankshares, Inc. ("FAB") regarding the hereinafter described matters related to BCCI. The "Abu Dhabi parties" are the following: (i) H.H. Sheikh Zayed bin Sultan Al-Nahyan, (ii) H.H. Sheikh Khalifa bin Zayed Al-Nahyan, (iii) H.H. Sheikh Sultan bin Zayed Al-Nahyan, (iv) H.H. Sheikh Mohammed bin Zayed Al-Nahyan, (v) Abu Dhabi Department of Finance, (vi) the Department of Private Affairs of Sheikh Zayed bin Sultan Al-Nahyan ("DPA"), (vii) Abu Dhabi Investment Authority ("ADIA"), and (viii) the members of the Board of Directors of ADIA, as set forth in Exhibit A hereto.

1. This Agreement relates to a series of entities that became known as the Bank of Credit and Commerce International. These entities grew rapidly through the 1970's and 1980's under the management of Agha Hasan Abedi and Swaleh Naqvi ("Naqvi") and, as ultimately structured, comprised the BCCI Holdings (Luxembourg),

S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Ltd., ICIC Apex Holding, Ltd., International Credit and Commerce Company (Overseas) Ltd., and/or any one or more of either of their direct and indirect affiliates, subsidiaries, or parent companies (all of which entities are hereinafter, for purposes of this Agreement only, collectively referred to as "BCCI"). Fraud and criminal conduct were involved in the operations of BCCI, and in 1991, BCCI was closed. The illicit activities and the circumstances that led to the closure of BCCI have become known (and are referred to herein) as "the BCCI affair."

2. The Abu Dhabi parties are entering into this Agreement because of their concern for victims of the BCCI affair and in furtherance of their desire to cooperate with and to assist DOJ, DANY and Board in matters relating to the BCCI affair. In addition to their own severe financial losses, the Abu Dhabi parties recognize that numerous innocent individuals and entities worldwide have suffered substantial economic losses, and agree to cooperate further with DOJ, DANY and Board in an effort to make accountable those persons responsible for such losses. Accordingly, the Abu Dhabi parties, at their expense, shall deliver or cause to be delivered without conditions, by April 1, 1994, to designated representatives of the court-appointed liquidators of the Bank of Credit and Commerce International, S.A. in Luxembourg and in England, the court-appointed liquidators of BCCI Holdings (Luxembourg), S.A. in Luxembourg, and the court-appointed

liquidators of the Bank of Credit and Commerce International (Overseas) Limited in the Cayman Islands ("Liquidating Authorities"), at their request, all of the original books and records of BCCI that are within their collective or individual, actual or constructive possession, custody, or control. Such delivery of documents to the Liquidating Authorities shall not be necessary if, by April 1, 1994, the Abu Dhabi parties reach binding comprehensive agreements with the Liquidating Authorities (which are conditioned only upon the Liquidating Authorities' obtaining any court approvals that they require to enter into such agreements). In the case of documents relating to or property of the United Arab Emirates branches of BCCI, it shall be sufficient for the Abu Dhabi parties to deliver copies.

3. The Abu Dhabi parties further are entering into this Agreement with the intent to and in order to cooperate fully with the ongoing investigations by United States federal and state law enforcement and regulatory agencies of violations of United States laws and regulations relating to the BCCI affair, and shall cooperate in those investigations. In addition, the Government of the United States will assist the law enforcement authorities of the United Arab Emirates with respect to the latter's ongoing investigations in connection with the BCCI affair. "Cooperate" means, in connection with the investigations of DOJ, DANY, and Board into violations of United States federal and state laws and regulations relating to the BCCI affair, (i) to use best and all available legal efforts and means to produce (or cause to be

produced) to DOJ, DANY, and Board any investigative information that is within the control of the relevant person, entity or party, or within the custody or control of third persons, entities or parties and (ii) to use best and all available legal efforts and means, in consultation with DOJ, DANY, and Board, and to the maximum extent practicable (taking into account the legal rights and obligations of the persons concerned), to persuade and facilitate the appearance of any person requested by DOJ, DANY or Board to testify in any duly convened grand jury, court, or other criminal, investigative, or administrative proceeding, or to facilitate alternative testimonial arrangements. "Investigative information" means documents, records, tangible evidence or other information in whatever media they might exist, including, but not limited to, paper, microfilm, microfiche, computer disks or other media (but not privileged documents) relevant to the investigations by DOJ, DANY, and Board into violations of United States federal and state laws and regulations. The Abu Dhabi parties shall consider the waiver of attorney-client and work product privileges in respect of documents that might assist in the prosecutions of third parties for violations of United States federal and state laws and regulations relating to the BCCI affair, on a case-by-case basis. For the avoidance of doubt, nothing in this Agreement constitutes any contractual obligation on the part of the Abu Dhabi parties to waive any privileges. "Produce . . . investigative information" means for purposes of DOJ, DANY, or Board investigations into violations of United States federal or state

law or regulations, (i) to grant access to investigative information to DOJ, DANY or Board, (ii) to provide copies of investigative information to DOJ, DANY, or Board, and (iii) to make available originals of investigative information, where practicable, to DOJ, DANY, or Board, all at the expense of the party or parties producing the investigative information. DOJ, DANY, and Board have no objection to the retention of copies by the Abu Dhabi parties of any documents delivered or produced under this Agreement. The custodian of any original documents under this Agreement shall provide certified copies when so requested. The cooperation of the Abu Dhabi parties in the investigations of DOJ, DANY, and Board into violations of United States federal or state law or regulations relating to the BCCI affair shall include the following:

- (a) The Abu Dhabi parties shall deliver (or cause to be delivered) to Board copies of the Naqvi documents, as described in Exhibit E, at the cost and expense of the Abu Dhabi parties, within 45 days of the effective date of this Agreement; provided that in the event that copies of all Naqvi documents have not been physically able to have been copied within such 45-day period, copies of all Naqvi documents then available shall be timely delivered and copies of other Naqvi documents shall be delivered as promptly as possible thereafter.
- (b) The Abu Dhabi parties acknowledge that the judicial authorities of the United Arab Emirates have the legal

power, ability, and authority to provide access in Abu Dhabi to the former officials of BCCI that are in the custody of United Arab Emirates authorities, namely the persons set forth in Part 1 of Exhibit B hereto, in order that DOJ, DANY, or Board may speak to them, privately or in the presence of their counsel, in the United Arab Emirates, and to provide copies of all statements made or given by such persons in connection with the BCCI affair. The Abu Dhabi parties covenant and agree that they shall, commencing within fourteen days of the effective date of this Agreement, cause the judicial authorities of the United Arab Emirates to provide to DOJ, DANY and Board such access to those persons listed in Part 1 of Exhibit B and to use best and all available legal efforts to provide such access to the persons listed in Part 2 of Exhibit B.

- (c) The Abu Dhabi parties covenant and agree to provide access in Abu Dhabi and shall produce (or cause to be produced) expeditiously, beginning with the effective date of this Agreement to DOJ, DANY, and Board any books and records of BCCI that are within their collective or individual, actual or constructive possession, custody, or control.
- (d) In relation to investigative information not constituting the books and records of BCCI that is within the collective or individual, actual or constructive

possession, custody, or control of the Abu Dhabi parties and in connection with the investigations of any violation of any United States federal or state law or regulation relating to the BCCI affair that are being pursued by DOJ, DANY, or Board, the Abu Dhabi parties shall (i) provide access expeditiously, beginning with the effective date of this Agreement, to DOJ, DANY and Board in Abu Dhabi and (ii) shall produce (or cause to be produced) expeditiously, beginning with the effective date of this Agreement, to DOJ, DANY and Board investigative information that is material to such investigations. To the extent that the Abu Dhabi parties dispute a DOJ, DANY, or Board request for a copy of or removal of any documents, records, tangible evidence or other information ("disputed information") that are not the books and records of BCCI, said dispute shall be submitted to the Attorney General of the United States of America and the District Attorney of the County of New York, State of New York for determination, and the concurrence of both shall be required for a finding that the disputed information is material to an investigation by DOJ, DANY, or Board of a violation of United States federal or state law or regulation.

- (e) Naqvi is presently on trial in the United Arab Emirates for crimes alleged to have been committed by him, and he has also been indicted in the United States. The Abu

Dhabi parties wish to facilitate his speedy trials. Accordingly, the Abu Dhabi parties covenant and agree that, within 120 days of the effective date of this Agreement, the Abu Dhabi parties shall deliver or cause to be delivered Naqvi to the United States to face charges there. The Abu Dhabi parties will make arrangements in accordance with United Arab Emirates law, and in consultation with DOJ, DANY and Board, for Naqvi's physical removal and transfer into the United States. At the conclusion of any United States federal and state criminal or regulatory proceedings, including service of any sentence imposed, and provided that his presence is no longer required by United States federal or state law enforcement or regulatory authorities, Naqvi will be returned by the United States to the United Arab Emirates, subject to applicable United States law and treaties. While he is in the United States, DOJ, DANY, and Board agree to make Naqvi available to the Abu Dhabi parties for interviews or depositions in the United States, subject to any legally applicable privileges under United States law.

In the event that any person should attempt by any legal process, to obtain from DOJ, DANY or Board any investigative information or other documentation provided to DOJ, DANY, or Board under this Agreement by the Abu Dhabi parties, DOJ, DANY or Board shall promptly notify the Abu Dhabi parties of such

attempt and, with respect to such investigative information or documentation shall, to the extent permitted by law, refrain from complying with such request or process until the Abu Dhabi parties have had an opportunity to be heard and to take whatever procedural or administrative steps may be open to them to prevent production of such materials.

4. To further assist victims of the BCCI affair, the Abu Dhabi parties agree to do the following by January 22, 1994:

- (a) file a notice of withdrawal of the claim submitted on or about September 8, 1992, pursuant to 18 U.S.C. section 1963(1) by DPA in connection with the forfeiture of monies of ICIC Investments Limited in connection with U.S. v. BCCI Holdings (Luxembourg), SA et al.;
- (b) release, assign to the debtor, or voluntarily discharge in a manner acceptable to the debtor and the Abu Dhabi parties, all rights, claims and indebtedness of the Abu Dhabi parties arising from the following debt instruments: (1) Credit and Commerce American Holdings, N.V. ("CCAH") convertible debentures; (2) loans to CCAH; (3) loans to FAC; (4) FAB senior notes; and (5) rights in the balance of a loan from Banque Arabe et Internationale d'Investissement to FAC, as further described in Exhibit C;
- (c) assign and transfer (except for voting rights, which shall remain with the registered owners but which shall be exercised only in accordance with joint instructions

to be provided by DOJ and DANY) all right, title, and interest of the Abu Dhabi parties in the shares of capital stock of CCAH, identified in Exhibit D annexed hereto, to the Federal Reserve Bank of New York ("Reserve Bank"), as agent of Board to be used to establish a restitutive fund pursuant to 12 U.S.C. Section 1818(b), in accordance with the terms and conditions set forth in paragraphs 5-7, infra, and provide whatever documents are necessary to accomplish such a transfer under the laws of the Netherlands Antilles, so that such CCAH shares are delivered to the Reserve Bank in good deliverable form. The Abu Dhabi parties assert that they have no legal or equitable interest in any CCAH shares of capital stock owned of record by Burford Investments, Ltd. ("Burford"), or in any Burford shares, and that they will make no claim of any interest in such shares. The Abu Dhabi parties agree, however, to assign and transfer unconditionally what interest they have, if any, in any such shares to the Reserve Bank.

5. As soon as practicable, Board shall:

- (a) cause Reserve Bank to surrender the CCAH stock transferred pursuant to paragraph (4)(c), supra, in return for a pro rata distribution of cash resulting from the sale or liquidation of CCAH's subsidiaries;
- (b) cause Reserve Bank to establish an account to be owned by Board to be titled "Board of Governors Account A," which

shall be funded with the cash proceeds derived from the CCAH stock referred to in paragraph (4)(c); and

- (c) cause Reserve Bank to invest the balance in Board of Governors Account A in United States Treasury Securities and/or overnight repurchase agreements for so long as there is a balance in the Board of Governors Account A. The earnings from such investments shall be credited to the Board of Governors Account A.

6. The Board shall distribute the balance in Board of Governors Account A to FAC and Liquidating Authorities, with FAC being paid first, when funds become available, in the amount of \$50 million less any amount received or to be received by FAC as a result of a distribution from B/G Settlement Account No. 1 created December 24, 1993, and the balance to the Liquidating Authorities when Board receives written notice from DOJ and DANY that the following events have occurred:

- (a) a binding comprehensive agreement regarding the BCCI affair has been reached between the Abu Dhabi parties and the Liquidating Authorities; and
- (b) the Liquidating Authorities have established, to the satisfaction of DOJ and DANY, reasonable procedures which are consistent with the laws of the countries governing distributions by the Liquidating Authorities and are designed to assure that the recipients of funds paid from Board of Governors Account A shall be limited to innocent depositors, creditors and other persons who suffered loss

arising from the activities of BCCI, and who did not themselves participate in criminal, illegal, or wrongful behavior in connection with the affairs of BCCI.

In the event such written notice is not received by Board on or before January 1, 1995, the balance in Board of Governors Account A shall promptly be distributed to or for the benefit of the depositors and creditors of BCCI (other than the Abu Dhabi parties) on the instructions of DOJ, DANY and Board.

7. With respect to the balance in Board of Governors Account A, the Abu Dhabi parties waive their right to receive any pro rata distribution of funds paid out of Board of Governors Account A to which they would be entitled to as a result of the liquidation of BCCI, and agree to execute any document that is reasonably requested as evidence of the waiver, provided that nothing contained in this Agreement is intended by the Abu Dhabi parties as a waiver of any claim that any of the Abu Dhabi parties may otherwise have against any company or entity that is a part of BCCI, except as set forth in paragraph 10.

8. DOJ, DANY and Board agree that none of them will seek or pursue any prosecution of, or initiate any civil or administrative proceeding against, any of the Abu Dhabi parties arising from the facts and circumstances of the BCCI affair, unless this Agreement is breached by the Abu Dhabi parties. For the purposes of this paragraph, a breach giving rise to the loss of the assurances set forth herein shall be limited to the following specific circumstances:

- a) failure timely to deliver the Naqvi documents in accordance with the provisions of paragraph 3(a);
- b) failure timely to provide access to those individuals in the custody of the United Arab Emirates authorities in accordance with paragraph 3(b);
- c) failure timely to deliver Naqvi pursuant to paragraph 3(e);
- d) failure to satisfy the provisions of paragraph (2); and
- e) failure to satisfy the provisions of paragraph 4(a) through (c).

In order to insure that the Abu Dhabi parties will satisfy the provisions of paragraphs 3(c) and 3(d) of this Agreement, the Abu Dhabi parties covenant and agree that:

- a) the Foreign Minister of the Government of the United Arab Emirates will provide formal assurances to the Government of the United States that the Abu Dhabi parties will honor and perform fully and completely their obligations under paragraphs 3(c) and 3(d);
- b) if the Abu Dhabi parties, individually or collectively, commit an unintentional violation of any obligation imposed by paragraphs 3(c) or 3(d) requiring the production of documents, DOJ, DANY, or Board, as the case may be, will be entitled to the delivery in the United States, if requested, of any and all investigative information described in paragraphs 3(c) or 3(d), respectively, so long as the request of DOJ, DANY, or

Board is bona fide and is for specific documents and such violation continues for ten days after receipt by the Abu Dhabi parties of written notice from DOJ, DANY or Board;

- c) if the Abu Dhabi parties, individually or collectively, commit a willful and intentional violation of any commitment imposed by virtue of paragraphs 3(c) or 3(d), the Abu Dhabi parties will be liable for a payment in the nature of liquidated damages in the sum of \$5 million per violation, but in no event in excess of \$100 million in the aggregate, and DOJ, DANY, or Board, may enforce this covenant and agreement by an action brought before the Supreme Court of the State of New York, New York County, if the enforcing party is DANY, or by an action in the United States District Court for the District of Columbia, if the enforcing party is DOJ or Board; provided that in such an action DOJ, DANY, or Board, as the case may be, shall be required to prove the violation by clear and convincing evidence and the parties agree that if a willful and intentional violation is proved, the court shall direct the payment to the Board of Governors Account A established under paragraph 5(b) of this Agreement.

9. The parties agree to a tolling of any applicable statute of limitations as of the effective date of this Agreement, to the extent that such is within their power, as to criminal and civil

matters or actions that may be brought by any party in accordance with the terms of this Agreement.

10. Based on information currently available, DOJ, DANY, and Board acknowledge and confirm the bona fides of the indebtedness to the Abu Dhabi parties referenced in paragraph 4(b) of this Agreement, and FAB, FAC, and the FAC Trustee, in furtherance of this Agreement, agree not to dispute same. In exchange for the agreements and commitments made by the Abu Dhabi parties in paragraph 4 hereof, FAC and FAB agree, as provided below, to settle the civil lawsuit filed by FAC and FAB in the United States Court for the District of Columbia with respect to all of the Abu Dhabi parties. FAC, FAB and the Abu Dhabi parties agree to negotiate in good faith and to enter into a separate settlement agreement that will provide for (1) the dismissal with prejudice and without costs of that lawsuit as to the Abu Dhabi parties, and (2) customary mutual general releases as to any and all claims by the parties to this Agreement against each other and corporate affiliates, officers, directors and agents to be defined in the settlement agreement, which settlement agreement will be filed with said Court within fourteen days after the effective date of this Agreement. In addition, FAC and FAB agree to cooperate reasonably in the

efforts of the Abu Dhabi parties to relieve the DPA of its obligations pursuant to certain outstanding indemnity agreements (and related escrow agreement). Until such settlement agreement is executed and effective, nothing contained in this paragraph 10 shall be deemed a waiver of any claim or defense that FAC, FAB or any of the Abu Dhabi parties may have against each other.

11. To avoid raising issues regarding the sovereign rights of the Abu Dhabi parties, DOJ, DANY, and Board agree that notwithstanding any other provision of this Agreement no member of the Abu Dhabi Ruling Family (the Al-Nahyan Family) will be required by DOJ, DANY, and Board to appear personally in connection with this Agreement. In addition, with respect to personal appearances by representatives of the Abu Dhabi Ruling Family or officials of the Abu Dhabi Government and the United Arab Emirates Government in connection with this Agreement, DOJ, DANY and Board agree to take into account and give consideration to the responsibilities and official duties of such persons. The Abu Dhabi parties agree to pay the costs incurred with respect to any personal appearances by representatives of the Abu Dhabi Ruling Family or officials of the Abu Dhabi Government and the United Arab Emirates Government in connection with this Agreement.

12. Any of the terms or conditions of this Agreement may be waived only in writing by the party entitled to the benefit thereof, but no such waiver shall affect or impair the right of the waiving party or parties to require observance, compliance, performance or satisfaction of any other term or condition hereof.

13. NO amendments to this Agreement shall be effective unless made in writing and signed by all parties. No representations, either orally or in writing, except those contained expressly in this Agreement, were made to induce any of the parties to enter into this Agreement. All prior negotiations, oral and written, are merged in this Agreement. Absent a breach of this Agreement, neither this Agreement nor any provision thereof or any act taken or caused to be taken by any of the parties in performance of its obligations under this Agreement shall be used by or against any of the parties or be admissible as evidence of any wrongdoing or liability by or against any of the parties in any legal or regulatory proceeding.

14. This Agreement is by way of settlement only with no adjudication of or finding on any issue of fact or law, and no party, by executing this Agreement or carrying out its terms, admits any wrongdoing or liability with respect to any allegations or claims.

15. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, United States of America, and any actions under this Agreement shall be brought in the United States.

16. This Agreement may be executed in one or more identical counterparts, whether transmitted by telecopier or otherwise, each of which such counterparts when executed and delivered shall be deemed to be an original for purposes of this Agreement, but all of

the counterparts together shall constitute one and the same instrument.

17. The effective date of this Agreement shall be January 8, 1994. This Agreement shall become binding irrespective of whether or not all of the Abu Dhabi parties have executed this Agreement, provided, however, that the benefits conferred and obligations imposed by this Agreement shall not inure in favor of or bind those Abu Dhabi parties who do not execute this Agreement on or before January 15, 1994.

18. All notices, communications and requests under this Agreement shall be made to:

(a) on behalf of DOJ:  
Gerald M. Stern  
Special Counsel  
for Financial Institution Fraud  
U.S. Department of Justice  
Washington, DC 20530

with a copy to:  
Lee J. Radek  
Director of Asset Forfeiture Office  
Criminal Division  
U.S. Department of Justice  
Washington, DC 20530

(b) on behalf of DANY:  
Robert M. Morgenthau  
District Attorney  
New York County  
One Hogan Place  
New York, New York 10013

with a copy to:  
John W. Moscow  
Assistant District Attorney  
New York County District Attorney  
One Hogan Place  
New York 10013

- (c) on behalf of Board:  
William W. Wiles  
Secretary  
Board of Governors of the Federal Reserve System  
Washington, DC 20551

with a copy to:  
J. Virgil Mattingly, Jr.  
General Counsel  
Board of Governors of the Federal Reserve System  
Washington, DC 20551

- (d) on behalf of FAC:  
Steve Brogan  
Jones, Day, Reavis & Pogue  
1450 G Street, N.W.  
Washington, D.C. 20006

- (e) on behalf of FAC Trustee:  
Harry W. Albright, Jr.  
Trustee, First American Corporation  
1270 Avenue of the Americas  
New York, NY 10020

with a copy to:  
Sol Neil Corbin  
Corbin Silverman & Sanseverino  
805 Third Ave.  
New York, NY 10022

- (f) on behalf of FAB:  
 Steve Brogan  
 Jones, Day, Reavis & Pogue  
 1450 G Street, N.W.  
 Washington, D.C. 20006
- (g) on behalf of the Abu Dhabi parties:  
 K.E. Ghanim Paris al Mazrui  
 c/o 8th floor, Chamber of Commerce Building  
 Abu Dhabi, United Arab Emirates

With a copy to:  
 Middleton A. Martin  
 Patton, Boggs & Blow  
 2550 M Street, NW  
 Washington, DC 20037

and

Jerry Walter  
 Simmons & Simmons  
 14 Dominion Street  
 London EC2M2RJ

19. The parties hereto agree to consult with each other in advance of any publication of or relating to this Agreement or any of its terms as to the nature, form and timing of such publicity.

Dated:

AGREED AND CONSENTED TO:

by

Gerald W. Stern  
 Gerald W. Stern  
 Special Counsel for Financial  
 Institution Fraud on behalf of the  
 United States Department of Justice

Date

by

John W. Moscow  
 John W. Moscow  
 Assistant District Attorney  
 on behalf of the New York County  
 District Attorney

Date

by

William W. Wiles  
 William W. Wiles  
 Secretary, Board of Governors  
 of the Federal Reserve System

1/5/74  
 Date

by	<u>Harry W. Albright, Jr.</u>	Date
	FAC Trustee	
by	<u>Charles Mathias, Chairman</u>	Date
	First American Corporation	
by	<u>Charles Mathias, Chairman</u>	Date
	First American Bankshares, Inc.	
by	<u>He</u>	Date
	on behalf of H.H. Sheikh Zayed bin Sultan Al-Nahyan	
by	<u>He</u>	Date
	on behalf of H.H. Sheikh Sultan bin Zayed Al-Nahyan	
by	<u>He</u>	Date
	on behalf of Department of Private Affairs of H.H. Sheikh Zayed bin Sultan Al-Nahyan	
by	<u>He</u>	Date
	on behalf of H.H. Sheikh Mohammed bin Zayed Al-Nahyan	
by	<u>He</u>	Date
	on behalf of the Abu Dhabi Department of Finance	
by	<u>He</u>	Date
	on behalf of the Abu Dhabi Investment Authority	
by	<u>He</u>	Date
	on behalf of H.H. Sheikh Tahnoon bin Mohammed Al-Nahyan	
by	<u>He</u>	Date
	on behalf of H.H. Sheikh Suroor bin Mohammed Al-Nahyan	
by	<u>He</u>	Date
	H.E. Ahmed Khalifa al Suweidi	

by	<u>Harry W. Albright, Jr.</u>	<u>Jan 8 1994</u> Date
by	<u>Charles Mathias</u> Charles Mathias, Chairman First American Corporation	<u>8 January 1994</u> Date
by	<u>Charles Mathias</u> Charles Mathias, Chairman First American Bankshares, Inc.	<u>8 January 1994</u> Date
by	on behalf of Sheikh Zayed bin Sultan Al-Nahyan	_____ Date
by	on behalf of Sheikh Sultan bin Zayed Al-Nahyan	_____ Date
by	on behalf of Department of Private Affairs of Sheikh Zayed bin Sultan Al-Nahyan	_____ Date
by	on behalf of Sheikh Mohammed bin Zayed Al-Nahyan	_____ Date
by	on behalf of the Abu Dhabi Department of Finance	_____ Date
by	on behalf of the Abu Dhabi Investment Authority	_____ Date
by	on behalf of Sheikh Tahnoon bin Mohammed Al-Nahyan	_____ Date
by	on behalf of Sheikh Suroor bin Mohammed Al-Nahyan	_____ Date
by	Ahmed Khalifa al Suweidi	_____ Date

by	<u>H.E. Mohammed Habroush al Suweidi</u>	Date
by	<u>H.E. Mohammed Khalifa al Kindi</u>	Date
by	<u>H.E. Mana Saeed al Otaiba</u>	Date
by	<u>H.E. Ghanim Faris al Mazrui</u>	Date
by	<u>H.E. Jauan Salem al Dhaheri</u>	Date
by	<u>H.E. Adnan Al Pachachi</u>	Date

**Exhibit A**

Chairman H.H. Sheikh Khalifa bin Zayed Al-Nahyan  
H.H. Sheikh Sultan bin Zayed Al-Nahyan  
H.H. Sheikh Mohammed bin Zayed Al-Nahyan  
H.H. Sheikh Tahnoon bin Mohammed Al-Nahyan  
H.H. Sheikh Suroor bin Mohammed Al-Nahyan  
H.E. Ahmed Khalifa al Suweidi  
H.E. Mohammed Habrour al Suweidi  
H.E. Mohammed Khalifa al Kindi  
H.E. Mana Saeed al Otaiba  
H.E. Ghanim Faris al Mazrui  
H.E. Jauan Salem al Daheri  
H.E. Adnan Al Pachachi

Exhibit B -- PART I

Swaleh Naqvi  
Hassan Mahmoud Kazmi  
Ameer Siddiki  
Mohammed Azmatullah  
Zafar Iqbal Chaudry  
Abdul Hafeez (Mohammed Ahmaed)  
Intiaz Ahmed  
Nasseem al Hassan Sheikh  
Bashir Tahir  
Fahir Hussain (Fakhir Hussein)

Exhibit B -- PART II

Iqbal Rizvi  
Saleem Siddiki  
Sohail Kizilbash  
Qaisar Raza  
Hassan Askari Khan  
Babar Saeed  
Mohammed Abdul Mujeeb  
Nadim Habibullah

## Exhibit C

1. Three Credit and Commerce American Holdings, N.V. ("CCAH") convertible debentures issued December 5, 1990, in the aggregate amount of \$8,496,130.33.
2. Three promissory notes issued by CCAH, dated February 14, 1991, in the aggregate amount of \$51,000,000.
3. Senior notes of First American Bankshares, Inc. ("FAB"), Series A-D, each dated as of December 1, 1986, as amended, in the aggregate principal amount of \$81,500,000, issued pursuant to Senior Note Agreements, each dated December 1, 1986, to various purchasers.
4. Two promissory notes of First American Corporation ("FAC"), each dated as of June 26, 1991, in the aggregate principal amount of \$39,150,000.
5. FAC's indebtedness under a loan agreement dated as of October 20, 1982, by and among FAC, Credit and Commerce American Investment, B.V., Banque Arabe et Internationale d'Investissement and certain other banking institutions pursuant to which a loan in the original principal amount of \$50,000,000 was made to FAC.

## Exhibit D

<u>Registered Owner</u>	<u>Number of Shares</u>
Abu Dhabi Investment Authority	19,141
Khalifa bin Zayed Al-Nahyan	28,741
Zayed bin Sultan Al-Nahyan	33,994

**Exhibit E**

The "Naqvi documents" referred to in paragraph 3(a) of the foregoing agreement shall mean those documents described in a letter dated November 15, 1993, from Patton, Boggs & Blow to DOJ, DANY, Board as indexed at 000073-000974.

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE, including the Schedules and Exhibits attached hereto and incorporated herein by reference (this "Release"), dated as of this 21<sup>st</sup> day of January, 1994, by and among, (1) Credit and Commerce American Holdings, N.V., a Netherlands Antilles corporation ("CCAH"), Credit and Commerce American Investment, B.V., a Netherlands corporation ("CCAI"), First American Corporation, a Virginia corporation ("FAC"), and First American Bankshares, Inc., a Virginia corporation ("FAB") (collectively, the "First American Companies"); (2) the trustee (the "Trustee") appointed by the United States District Court for the District of Columbia (the "Court") pursuant to the Order Appointing Trustee, entered by the Court on June 23, 1992; and (3) H.H. Sheikh Zayed bin Sultan Al-Nahyan, H.H. Sheikh Khalifa bin Zayed Al-Nahyan, H.H. Sheikh Sultan bin Zayed Al-Nahyan, H.H. Sheikh Mohammed bin Zayed Al-Nahyan, H.E. Ghanim Faris al Mazrui, the Abu Dhabi Department of Finance, the Abu Dhabi Investment Authority ("ADIA"), and the Department of Private Affairs of H.H. Sheikh Zayed bin Sultan Al-Nahyan (the "DPA") (collectively, the "Abu Dhabi Parties").

**WITNESSETH:**

WHEREAS, FAC and FAB have asserted certain claims against certain of the Abu Dhabi Parties and other named defendants in the action captioned First American Corporation, et al. v. Sheikh Zayed Bin Sultan Al-Nahyan, et al., C.A. No. 93-1309 (JHG) (the "Litigation") and filed with the Court; and

WHEREAS, the Abu Dhabi Parties entered into the Agreement dated January 8, 1994 (the "Agreement"), by and among the Abu Dhabi Parties, the United States Department of Justice ("DOJ"), the New York County District Attorney's Office ("DANY"), the Board of Governors of the Federal Reserve System (the "Board"), the Trustee, FAC and FAB (1) because of their concern for victims of the illicit activities and circumstances that led to the closure of the entities that became known as the Bank of Commerce and Credit International ("BCCI"), which activities and circumstances have become known and are referred to herein as "the BCCI Affair," and in furtherance of their desire to cooperate with and to assist DOJ, DANY and the Board in matters relating to the BCCI Affair, and (2) because the Abu Dhabi Parties recognize that, in addition to their own severe financial losses, numerous innocent individuals and entities worldwide have suffered substantial economic losses, and they have agreed to cooperate further with DOJ, DANY and Board in an effort to make accountable those persons responsible for such losses; and

WHEREAS, the Agreement provides, among other things, that (1) the Abu Dhabi Parties shall release, assign to the debtor, or voluntarily discharge in a manner acceptable to the debtor and the Abu Dhabi Parties, all rights, claims and indebtedness arising from the debt instruments and related obligations of the respective First American Companies held by certain of the Abu Dhabi Parties as described in Schedule 1 hereto (the "First American Indebtedness"); (2) the Abu Dhabi Parties shall assign and transfer to the Federal Reserve Bank of New York (the "Reserve Bank") all right, title and interest (except for voting rights, which shall remain with the registered owners but which shall be exercised only in accordance with joint instructions to be provided by DOJ and DANY) in and to 81,876 shares of capital stock of CCAH owned by certain of the Abu Dhabi Parties (the

"CCAH Shares"); and (3) FAC shall receive from the Reserve Bank up to \$50 million from the distribution of proceeds allocated to the CCAH Shares; and

WHEREAS, pursuant to the terms of the Agreement, FAC, FAB and the Abu Dhabi Parties agreed to negotiate in good faith and to enter into a separate settlement agreement that provides for (1) the dismissal, with prejudice and without costs, of the Litigation as against certain of the Abu Dhabi Parties who are defendants in the Litigation, and (2) customary mutual general releases as to any and all claims by the parties to the Agreement against each other, which settlement agreement is to be filed with the Court on or before January 22, 1994; and

WHEREAS, certain of the Abu Dhabi Parties previously agreed to guarantee certain indemnity obligations undertaken by certain of the First American Companies to certain of their former and current officers and directors and to establish a related escrow fund in furtherance of said guarantees, which guarantees and related escrow agreement are listed on Schedule 2 hereto (the "Guarantees"); and

WHEREAS, FAC and FAB have agreed in the Agreement to cooperate reasonably in the efforts of the Abu Dhabi Parties to relieve all obligations of the Abu Dhabi Parties pursuant to the Guarantees; and

WHEREAS, this Release is meant to effectuate the purposes of the Agreement set forth in the preceding paragraphs; and

WHEREAS, the Trustee and the First American Companies have concluded that a settlement of the Litigation against Abu Dhabi Parties who are defendants therein on the terms and conditions set forth in the Agreement and in this Release is in the best interests of the First American Companies;

NOW THEREFORE, for and in consideration of the premises and of the mutual promises, releases and agreements herein contained, the parties hereto agree as follows:

**Section 1. Release, Discharge and/or Assignment of Indebtedness.**

(a) (i) In the Agreement, DOJ, DANY and the Board each acknowledged and confirmed, based on information currently available, the bona fides of the First American Indebtedness, and FAB, FAC and the Trustee, in furtherance of the Agreement and this Release, agree not to dispute same. In reliance upon such acknowledgment, confirmation and agreement, to further assist the other victims of the BCCI affair and in exchange for the promises and agreements herein, the Abu Dhabi Parties, individually and in their official capacities, for themselves, their respective heirs, executors, administrators, predecessors, successors, divisions, assigns and controlled affiliates and their respective current officers, directors, employees, advisors, attorneys and agents, hereby permanently, irrevocably and unconditionally release and forever discharge any and all persons and entities from any and all manner of claims, demands, damages, actions, causes of action, contracts, agreements, charges, sums of money (whether for payment or repayment of principal, interest, penalties, costs, fees or other amounts), security interests and claims on collateral of whatever nature (whether guaranty, pledge, shares of capital stock or otherwise), claims for attorneys' fees and lawsuits of every kind and description whatsoever, in law or equity, whether known or unknown, now existing or which may hereafter arise under the laws of the United States, any State thereof, or any other jurisdiction, based upon, arising out of, or having connection in any way whatsoever with the First American Indebtedness except as provided in Section 1(a)(ii) below.

(ii) Notwithstanding the foregoing, nothing in this Section 1 shall be deemed a release by any of the Abu Dhabi Parties of any claims against persons or entities other than the First American Releasees (as defined in Section 6 hereof) that relate to the First American Indebtedness but that do not arise out of the contractual obligations to the Abu Dhabi Parties represented by the First American Indebtedness.

(iii) If and to the extent that any suit or claim relating to the First American Indebtedness made at any time by or on behalf of any of the Abu Dhabi Parties against any persons or entities results in any claim against any of the First American Companies for payment, contribution or indemnification by or on behalf of such person or entity (a "Claim"), then (a) none of the Abu Dhabi Parties shall be subrogated to all or any part of such Claim, and (b) the Abu Dhabi Parties that shall have brought such claim or suit shall indemnify and hold harmless the First American Companies from any and all losses, damages, liabilities and reasonable costs and expenses (including reasonable attorney's fees) incurred by the First American Companies as a result of such Claim, and may at their option defend the First American Companies from such Claim; provided, however, that the First American Companies shall defend in good faith against such a Claim if and to the extent that the Abu Dhabi Parties do not exercise their right to defend same. Each First American Company against which any Claim is asserted shall give the Abu Dhabi Parties written notice thereof; provided that the failure to give such notice shall not affect the right to indemnification under this clause (iii) except if and to the extent that the Abu Dhabi Parties shall have been actually prejudiced as a result of such failure.

(b) Concurrently herewith, the relevant Abu Dhabi Parties have (i) delivered to the First American Companies for cancellation each and every instrument of indebtedness

set forth on Schedule 3 hereto, and (ii) executed and delivered to CCAI and FAC the assignment agreement relating to certain of the First American Indebtedness, in the form attached hereto as Exhibit A. The First American Companies hereby accept and acknowledge receipt of the instruments of indebtedness set forth in Schedule 3 and agree that all of said instruments delivered herewith are in form and substance valid and acceptable, and the First American Companies each agree to prepare, execute and deliver any documents and do all things as may be necessary pursuant to applicable law to effect the cancellation of the First American Indebtedness.

(c) Concurrently herewith, the relevant Abu Dhabi Parties have executed and delivered to the First American Companies the Irrevocable Stock Powers relating to the FAC and FAB stock, in the form attached hereto as Exhibit B, and have delivered to FAC Stock Certificate Number 007, representing 51 shares of the common stock of FAB.

(d) The Abu Dhabi Parties hereby represent and warrant that they have not assigned to any person or entity other than to a party to this Release any right, title or interest in or to the First American Indebtedness, the collateral securing the First American Indebtedness or any and all documents evidencing any of the First American Indebtedness or collateral relating thereto. The Abu Dhabi Parties further represent and warrant that they are the holders, as their interests appear, of the First American Indebtedness identified in items 1, 2, 3 and 5 on Schedule 1 hereto, and that, to the best of their knowledge, they are the holders, as their interests appear, of that certain loan identified in item 4 on Schedule 1 hereto.

(e) Concurrently herewith, the Trustee and the Abu Dhabi Parties will cause their respective counsel to execute and submit to the Court a joint motion in the form

attached hereto as Exhibit C seeking the return from the Court to the Trustee of the FAC stock certificate.

**Section 2. Dismissal of Certain Claims in the Litigation.** Concurrently herewith, FAC and FAB will cause their counsel in the Litigation to execute and submit to the Court a Notice of Voluntary Dismissal of Action in the form attached hereto as Exhibit D (the "Notice"). The Notice will preserve all of FAC's and FAB's rights, claims, causes of action and damages against the other defendants to the Litigation named in Schedule 4 hereto (the "Other Defendants").

**Section 3. Transfer of CCAH Shares.** Contemporaneously herewith, the relevant Abu Dhabi Parties are irrevocably assigning and transferring all of their right, title and interest in and to the CCAH Shares to the Reserve Bank. CCAH agrees to prepare, execute and deliver any documents and do all things as may be necessary pursuant to applicable law to effect the assignment and transfer of the CCAH Shares.

**Section 4. Release by the First American Companies and Trustee.** (a) The First American Companies and the Trustee, for themselves, their respective heirs, executors, administrators, successors, divisions, assigns and controlled affiliates and their respective current officers, directors, employees, advisors, attorneys, and agents, hereby permanently, irrevocably and unconditionally release and forever discharge the Abu Dhabi Parties, their present and former subsidiaries and each of their respective heirs, executors, administrators, predecessors, successors, divisions, assigns, and controlled affiliates, and the respective current officers, directors, shareholders, employees and attorneys of each of the foregoing, as well as their respective agents and advisors to the extent of their services provided directly to the Abu Dhabi Parties or their present and former subsidiaries and

each of their respective predecessors, successors, divisions, assigns and controlled affiliates pursuant to the authorization or direction of same, and each of their respective heirs, executors and administrators (but not including any of the Other Defendants or BCCI as defined in Section 7 hereof) (hereinafter collectively termed the "Current Abu Dhabi Releasees") from any and all manner of claims, demands, damages, actions, causes of action, contracts, agreements, charges, sums of money, claims for attorneys' fees and law-suits of every kind and description whatsoever, in law or equity, whether known or unknown, now existing or which may hereafter arise against the Current Abu Dhabi Releasees, or any of them, under the laws of the United States, any State thereof, or any other jurisdiction, for or by reason of any matter, cause, or thing whatsoever prior to the Effective Date hereof, including, without limitation, any of the claims asserted against the Abu Dhabi Parties in the Litigation, regardless of whether future damages may result therefrom.

(b) The First American Companies and the Trustee, for themselves, their respective heirs, executors, administrators, successors, divisions, assigns and controlled affiliates and their respective current officers, directors, employees, advisors, attorneys, and agents, hereby permanently, irrevocably and unconditionally release and forever discharge each of the respective former officers, directors, shareholders, employees and attorneys of the Abu Dhabi Parties and their respective present and former subsidiaries, as well as their respective agents and advisors to the extent of their services provided directly to the Abu Dhabi Parties or their present and former subsidiaries and each of their respective predecessors, successors, divisions, assigns and controlled affiliates pursuant to the authorization or direction of same, and each of their respective heirs, executors and administrators (but not including any of the Other Defendants or BCCI as defined in Section 7 hereof)

(hereinafter collectively termed the "Former Abu Dhabi Releasees") (the Current Abu Dhabi Releasees together with the Former Abu Dhabi Releasees hereinafter collectively termed the "Abu Dhabi Releasees") from any and all manner of claims, demands, damages, actions, causes of action, contracts, agreements, charges, sums of money, claims for attorneys' fees and lawsuits of every kind and description whatsoever, in law or equity, whether known or unknown, now existing or which may hereafter arise against the Former Abu Dhabi Releasees, or any of them, under the laws of the United States, any State thereof, or any other jurisdiction, for or by reason of any matter, cause, or thing whatsoever relating to the affairs or share ownership of the First American Companies (including their present and former subsidiaries, predecessors, successors, divisions, assigns and controlled affiliates) prior to the Effective Date hereof including, without limitation, any of the claims asserted against the Abu Dhabi Parties in the Litigation, regardless of whether future damages may result therefrom.

(c) Notwithstanding the foregoing, nothing in this Section 4 shall be deemed a release of such claims as any of the following current or former officers or directors of the First American Companies may have in an individual capacity against the Abu Dhabi Parties under the Guarantees unless such individual current or former officer or director and the Abu Dhabi Parties execute and deliver a release agreement substantially in the form of Exhibit E-1 or E-2 (as appropriate to said individual) hereto (the "Exhibit E Agreement") and agree to be bound by the mutual releases contained therein, which include a release and extinguishment of any rights such Indemnitees might otherwise have under the Guarantees: Nicholas Katzenbach, George Davis, Donald Glickman, Charles McC.C. Mathias, Jack Beddow and Paul Adams (collectively the "Indemnitees"). The First

American Companies agree to cooperate reasonably in the efforts of the Abu Dhabi Parties to relieve any obligations of the Abu Dhabi Parties pursuant to the Guarantees.

**Section 5. Reservation of Rights by the First American Companies and Trustee.**

By the release set forth in Section 4 hereof, the First American Companies and the Trustee release claims only against the Abu Dhabi Releasees. The First American Companies and the Trustee expressly reserve all rights, claims, causes of action and damages, including but not limited to those asserted by FAC and FAB in the Litigation, that they have or may have against the Other Defendants or BCCI as defined in Section 7 hereof. The First American Companies and the Trustee expressly reserve all rights, claims, causes of action and damages that they may have against all others.

**Section 6. Release by the Abu Dhabi Parties.** (a) Except as provided below, the Abu Dhabi Parties, individually and in their official capacities, for themselves, each of their respective heirs, executors, administrators, successors, divisions, assigns and controlled affiliates and their respective current officers, directors, employees, advisors, attorneys and agents, hereby permanently, irrevocably and unconditionally release and forever discharge the Trustee and the First American Companies, their respective current and former subsidiaries and each of their respective heirs, executors, administrators, predecessors, successors, divisions, assigns, and their controlled affiliates, and the respective current officers, directors, employees and attorneys of each of the foregoing, as well as their respective agents and advisors to the extent of their services provided directly to the Trustee or the First American Companies or their present and former subsidiaries and each of their respective predecessors, successors, divisions, assigns and controlled affiliates pursuant to the authorization or direction of same, and each of their respective

heirs, executors and administrators (but not including any of the Other Defendants, any current or former record shareholders of CCAH (subject to the covenant set forth in the proviso of paragraph (c) of this Section 6) or BCCI as defined in Section 7 hereof) (hereinafter collectively termed the "Current First American Releasees") from any and all manner of claims, demands, damages, actions, causes of action, contracts, agreements, charges, sums of money, claims for attorneys' fees and lawsuits of every kind and description whatsoever, in law or equity, whether known or unknown, now existing or which may hereafter arise against the Current First American Releasees, or any of them, under the laws of the United States, any State thereof, or any other jurisdiction, for or by reason of any matter, cause, or thing whatsoever prior to the Effective Date hereof, including, without limitation, any of the claims the Abu Dhabi Parties could have asserted against the First American Companies in the Litigation, regardless of whether future damages may result therefrom.

(b) Except as provided below, the Abu Dhabi Parties, individually and in their official capacities, for themselves, each of their respective heirs, executors, administrators, successors, divisions, assigns and controlled affiliates and their respective current officers, directors, employees, advisors, attorneys and agents, hereby permanently, irrevocably and unconditionally release and forever discharge each of the respective former officers, directors, employees and attorneys of the Trustee or the First American Companies and their respective present and former subsidiaries, as well as their respective agents and advisors to the extent of their services provided directly to the Trustee or the First American Companies or their present and former subsidiaries and each of their respective predecessors, successors, divisions, assigns and controlled affiliates pursuant to the

authorization or direction of same, and each of their respective heirs, executors and administrators (but not including any of the Other Defendants, any current or former record shareholders of CCAH (subject to the covenant set forth in the proviso of paragraph (c) of this Section 6) or BCCI as defined in Section 7 hereof) (hereinafter collectively termed the "Former First American Releasees") (the Current First American Releasees together with the Former First American Releasees hereinafter collectively termed the "First American Releasees") from any and all manner of claims, demands, damages, actions, causes of action, contracts, agreements, charges, sums of money, claims for attorneys' fees and lawsuits of every kind and description whatsoever, in law or equity, whether known or unknown, now existing or which may hereafter arise against the Former First American Releasees, or any of them, under the laws of the United States, any State thereof, or any other jurisdiction, for or by reason of any matter, cause, or thing whatsoever relating to the affairs or share ownership of the First American Companies (including their present and former subsidiaries, predecessors, successors, divisions, assigns and controlled affiliates) prior to the Effective Date hereof, including, without limitation, any of the claims the Abu Dhabi Parties could have asserted against the First American Companies in the Litigation, regardless of whether future damages may result therefrom.

(c) Notwithstanding the foregoing, nothing in this Section 6 shall be deemed a release of any claims any of the Abu Dhabi Parties might have or assert against (i) the First American Companies or any Indemnitee arising out of the Guarantees unless each of the Indemnitees and the Abu Dhabi Parties execute and deliver an Exhibit E Agreement and agree to be bound by the mutual releases contained therein, which include a release and extinguishment of any rights such Indemnitee might otherwise have against the Abu Dhabi

Parties under the Guarantees, or (ii) any former officer, director, employee or attorney of the First American Companies who is either among the Other Defendants or an Indemnitee unless such Other Defendant or Indemnitee and the Abu Dhabi Parties execute and deliver an Exhibit E Agreement and agree to be bound by the mutual releases contained therein; provided, however, that the Abu Dhabi Parties hereby covenant and agree not to sue or file any claim against any former officer, director, employee or attorney of the First American Companies who is either among the Other Defendants or an Indemnitee unless such Other Defendant or Indemnitee first makes a demand or claim of any sort against any of the Abu Dhabi Parties.

(d) If and to the extent that any suit or claim made at any time by or on behalf of any of the Abu Dhabi Parties against any former officer, director, employee or attorney of the First American Companies who is either among the Other Defendants or an Indemnitee results in any claim against any of the First American Companies for payment, contribution or indemnification by or on behalf of such individual ("Third-Party Claim"), then (i) none of the Abu Dhabi Parties shall be subrogated to all or any part of such Third-Party Claim, and (ii) the Abu Dhabi Parties that shall have brought such claim or suit shall indemnify and hold harmless the First American Companies from any and all losses, damages, liabilities, and reasonable costs and expenses (including reasonable attorney's fees) incurred by the First American Companies as a result of such Third-Party Claim, and may at their option defend the First American Companies from such Third-Party Claim; provided, however, that the First American Companies shall defend in good faith against such a Third-Party Claim if and to the extent the Abu Dhabi Parties do not exercise their right to defend same. Each First American Company against which any Third-Party Claim is asserted shall give

the Abu Dhabi Parties written notice thereof; provided that the failure to give such notice shall not affect the right to indemnification under this paragraph (b) except if and to the extent that the Abu Dhabi Parties shall have been actually prejudiced as a result of such failure.

**Section 7. Reservation of Rights by the Abu Dhabi Parties.** By the release set forth in Section 6 hereof, the Abu Dhabi Parties release claims only against the First American Releasees. The Abu Dhabi Parties expressly reserve all rights, claims, causes of action and damages that they have or may have against (i) the Other Defendants or any current or former record shareholder of CCAH (subject to the covenant set forth in the proviso of Section 6 (a) hereof) or (ii) BCCI, which, for the purposes of this Section 7 shall mean (a) BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Ltd., ICIC Apex Holdings Ltd., International Credit and Commerce Company (Overseas) Ltd., and/or any one or more of their direct or indirect affiliates, subsidiaries or parent companies (but not including the First American Companies or their current or former subsidiaries) and (b) the court-appointed liquidators of Bank of Credit and Commerce International, S.A. in Luxembourg and in England, the court-appointed liquidators of BCCI Holdings (Luxembourg), S.A. in Luxembourg, and the court-appointed liquidators of Bank of Credit and Commerce International (Overseas) Ltd., in the Cayman Islands. The Abu Dhabi Parties expressly reserve all rights, claims, causes of action and damages that they may have against all others.

**Section 8. Director and Officer Benefits.** If, at any time, the First American Companies provide or establish any insurance, reserve, escrow account, or other general

arrangement to provide a source of funds for contingent indemnification obligations of the First American Companies to current or former directors or officers relating to events occurring prior to the Effective Date hereof with respect to which no claim for indemnification has been made, the First American Companies covenant that they will, to the extent reasonably practicable, include the indemnification obligations of the First American Companies to the Indemnitees under the indemnity agreements to which the Guarantees relate among the indemnification obligations for which such insurance, reserve, escrow account or other general arrangement may be provided or established.

**Section 9. Representation.** The Abu Dhabi Parties, FAC, FAB and the Trustee each for themselves represent and warrant that he or it has all requisite power and authority to enter into this Release and that the execution and delivery by the individuals executing this Release have been duly authorized. Jack W. Beddow is signing this Release on behalf of CCAH and CCAI in the capacity of sole acting Managing Director of CCAH and CCAI.

**Section 10. Further Assurances.** Each party hereto agrees to execute and deliver all documents and instruments and to take or cause to be taken such other actions as are reasonably necessary or appropriate to consummate the agreements and releases contemplated by this Release.

**Section 11. Effective Date.** This Release shall be effective at the time of filing with the Court of the Notice (the "Effective Date").

**Section 12. Non-Assignment.** The First American Companies and the Trustee represent and warrant to the Abu Dhabi Releasees that they have not assigned or transferred, and prior to the Effective Date hereof will not assign or transfer, any claim they

have or may have arising out of or by reason of any matter, cause or thing whatsoever occurring prior to the Effective Date hereof against any of the Abu Dhabi Releasees to any other person or entity. Likewise, the Abu Dhabi Parties represent and warrant that they have not assigned or transferred, and prior to the Effective Date hereof will not assign or transfer, any claim they have or may have arising out of or by reason of any matter, cause or thing whatsoever occurring prior to the Effective Date hereof against the First American Releasees to any other person or entity; provided, however, that the appropriate Abu Dhabi Parties are contemporaneously assigning their right, title and interest in and to the CCAH Shares to the Federal Reserve Bank of New York as agent of the Board.

**Section 13. No Admission of Liability.** Nothing in this Release is or shall be construed as an admission of liability, a waiver of any rights and privileges attendant to the sovereign status of any of the Abu Dhabi Parties or submission to the jurisdiction of any court in the United States. The execution of this Release on behalf of the DPA shall not be deemed as an admission by the Abu Dhabi Parties of or as conferring upon the DPA any juridical status or the capacity to sue or be sued, or to waive any defense relating thereto.

**Section 14. Amendment and Waiver.** This Release may be amended, modified, waived, discharged or terminated only by an instrument in writing signed by all of the parties hereto.

**Section 15. Beneficiaries, Successors and Assigns.** This Release shall inure to the benefit of the parties identified in Sections 1, 4 and 6 hereof.

**Section 16. Entire Agreement.** This Release, together with its Schedules and Exhibits, constitutes the entire agreement among the parties with respect to the subject matter hereof, and there are no agreements among the parties hereto with respect thereto

except as expressly set forth herein. No representations, either oral or written, except those contained expressly in this Release, were made to induce any of the parties to enter into this Release.

**Section 17. Severability; Enforceability.** In case any provision contained in this Release is held to be illegal, invalid or unenforceable under present or future laws effective while this Release remains in effect, the legality, validity and enforceability of the remaining provisions will not in any way be affected or impaired thereby, and in lieu of each such illegal, invalid or unenforceable provision the parties shall negotiate in good faith to add a provision that is legal, valid and enforceable and as similar in terms to such illegal, invalid or unenforceable provision as may be possible while giving effect to the benefits and burdens for which the parties have bargained hereunder.

**Section 18. Governing Law.** This Release will be governed by and construed in accordance with the laws of the State of New York, without regard to its principles concerning conflicts of laws, and any actions under this Release shall be brought exclusively in the United States District Court for the District of Columbia.

**Section 19. Counterparts.** This Release may be executed in any number of counterparts, whether transmitted by telecopier or otherwise, each of which shall be deemed to be an original, and all of which together shall be deemed to be one and the same instrument.

**Section 20.** Notices. All notices, communications and requests under this Release shall be made to:

- (a) on behalf of the First American Companies:

Stephen J. Brogan  
Jones, Day, Reavis & Pogue  
1450 G Street, N.W.  
Washington, D.C. 20006

- (b) on behalf of the Trustee:

Sol Neil Corbin  
Corbin, Silverman & Sanseverino  
805 Third Avenue  
New York, New York 10022

- (c) on behalf of the Abu Dhabi Parties:

Jean V. MacHarg  
Patton, Boggs & Blow  
2550 M Street N.W.  
Washington, D.C. 20037

**Section 21.** Publication. The parties hereto agree that they shall issue a joint press release in the form attached hereto as Exhibit E, announcing that the parties have entered into and filed with the United States District Court for the District of Columbia this Release (the "Joint Press Release"). The parties further agree that they will not publish the Joint Press Release prior to 3:00 p.m. on January 21, 1994, and that they will publish no other written press release relating to this Release prior to publication of the Joint Press Release.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Release on  
this 21<sup>st</sup> day of January, 1994.

CREDIT AND COMMERCE AMERICAN  
HOLDINGS, N.V.

By: Jack W. Beddow  
Jack W. Beddow, Managing Director

CREDIT AND COMMERCE AMERICAN  
INVESTMENT, B.V.

By: Jack W. Beddow  
Jack W. Beddow, Managing Director

TRUSTEE, FIRST AMERICAN CORPORATION

---

Harry W. Albright Jr., as Trustee

FIRST AMERICAN CORPORATION

By: Charles McC. Mathias  
Charles McC. Mathias, Chairman

FIRST AMERICAN BANKSHARES, INC.

By: Charles McC. Mathias  
Charles McC. Mathias, Chairman

IN WITNESS WHEREOF, the Parties hereto have duly executed this Release on  
this 21<sup>st</sup> day of January, 1994.

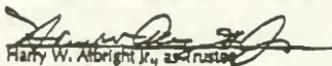
CREDIT AND COMMERCE AMERICAN  
HOLDINGS, N.Y.

By: Jack W. Beddow, Managing Director

CREDIT AND COMMERCE AMERICAN  
INVESTMENT, I.V.

By: Jack W. Beddow, Managing Director

TRUSTEE, FIRST AMERICAN CORPORATION

  
Harry W. Albright Jr., as Trustee

FIRST AMERICAN CORPORATION

By: Charles McC. Mathias, Chairman

FIRST AMERICAN BANKSHARES, INC.

By: Charles McC. Mathias, Chairman

H.H. SHEIKH ZAYED BIN SULTAN  
AL-NAHYAN

*Ar*

H.H. SHEIKH KHALIFA BIN ZAYED  
AL-NAHYAN

*Ar*

H.H. SHEIKH SULTAN BIN ZAYED  
AL-NAHYAN

*Ar*

H.H. SHEIKH MOHAMMED BIN ZAYED  
AL-NAHYAN

*Ar*

H.E. CHANIM FARIS AL MAZRUI

*Ar*

ABU DHABI DEPARTMENT OF FINANCIAL

By:

Name: H.E. Mohammed Habroush al Suweidi  
Title: Chairman

ABU DHABI INVESTMENT AUTHORITY

By:

Name: H.E. Mohammed Habroush al Suweidi  
Title: Managing Director

DEPARTMENT OF PRIVATE AFFAIRS OF  
H.H. SHEIKH ZAYED BIN SULTAN  
AL-NAHYAN

By:

Name: H.E. Ghanim Faris al Mazrui  
Title: Chairman

**SCHEDULE 1****First American Indebtedness**

1. The loans to CCAH evidenced by the Convertible Debentures issued on December 5, 1990 to each of H.H. Sheikh Zayed bin Sultan Al-Nahyan, in the original aggregate principal amount of \$3,528,000.00, H.H. Sheikh Khalifa bin Zayed Al-Nahyan, in the original principal amount of \$2,982,000.00 and ADIA, in the original principal amount of \$1,986,130.33.
2. The loans to CCAH evidenced by the Promissory Notes issued on February 14, 1991 to each of H.H. Sheikh Zayed bin Sultan Al-Nahyan, in the original principal amount of \$25,809,027.10, H.H. Sheikh Khalifa bin Zayed Al-Nahyan, in the original principal amount of \$21,814,772.90 and ADIA, in the original principal amount of \$3,376,200.00.
3. The loans to FAC evidenced by the Promissory Notes issued on June 26, 1991 to each of H.H. Sheikh Zayed bin Sultan Al-Nahyan, in the original principal amount of \$21,217,000.00, and H.H. Sheikh Khalifa bin Zayed Al-Nahyan, in the original principal amount of \$17,933,000.00.
4. The loan made pursuant to the Loan Agreement dated as of October 20, 1982 by and among FAC, CCAI, Banque Arabe et Internationale D'Investissement ("BAII"), as agent, and certain banks, and purchased by H.H. Sheikh Zayed bin Sultan Al-Nahyan, pursuant to the Assignment Agreement dated as of March 23, 1992, by and between BAII, individually and as agent, and H.H. Sheikh Zayed Bin Sultan Al-Nahyan, acting through his attorney-in-fact, in the currently outstanding principal amount of \$9,350,000.00.
5. The loans to FAB evidenced by the \$25,000,000.00 8.70% Senior Notes, Series A, due December 1, 1991; \$5,000,000.00 8.90% Senior Notes, Series B, due December 1, 1992; \$27,500,000.00 9.21% Senior Notes, Series C, due December 1, 1993; \$24,000,000.00 9.40% Senior Notes, Series D, due December 1, 1994 ("FAB Senior Notes") and purchased by H.H. Sheikh Zayed bin Sultan Al-Nahyan, acting through his attorney-in-fact, in the original principal amount of \$81,500,000.00.
6. All security, pledge and guaranty instruments relating to items 1 through 5 above.

SCHEDULE 2

I. Indemnity Agreements in favor of:

Nicholas de B. Katzenbach  
Paul G. Adams, III  
Jack W. Beddow  
Charles McC. Mathias  
George L. Davis  
Donald Glickman

II. Escrow Agreement dated May 1, 1992 among Morgan Guaranty Trust Company of New York, the DPA and the individuals referenced in Part I of this Schedule 2.

SCHEDULE 3Instruments Tendered By The Abu Dhabi Parties

1. The originally executed Convertible Debenture of CCAH dated December 5, 1990, in the original principal amount of \$3,528,000.00 and issued to H.H. Sheikh Zayed bin Sultan Al-Nahyan.
2. The originally executed Convertible Debenture of CCAH dated December 5, 1990, in the original principal amount of \$2,982,000.00 and originally issued to H.H. Sheikh Khalifa bin Zayed Al-Nahyan.
3. The originally executed Convertible Debenture of CCAH dated December 5, 1990, in the original principal amount of \$1,986,130.33 and originally issued to ADIA.
4. The originally executed Promissory Note of CCAH dated February 14, 1991, in the original principal amount of \$25,809,027.10 and originally issued to H.H. Sheikh Zayed bin Sultan Al-Nahyan.
5. The originally executed Promissory Note of CCAH dated February 14, 1991, in the original principal amount of \$21, 814,772.90 and originally issued to H.H. Sheikh Khalifa bin Zayed Al-Nahyan.
6. The originally executed Promissory Note of CCAH dated February 14, 1991, in the original principal amount of \$3,376,200.00 and originally issued to ADIA.
7. The originally executed Promissory Note of FAC dated June 26, 1991, in the original principal amount of \$21, 217,000.00 and originally issued to H.H. Sheikh Zayed bin Sultan Al-Nahyan.
8. The originally executed Promissory Note of FAC dated June 26, 1991, in the original principal amount of \$17,933,000.00 and originally issued to H.H. Sheikh Khalifa bin Zayed Al-Nahyan.
9. Each of the originally executed 8.7% Senior Notes, Series A due December 1, 1991, in the aggregate principal amount of \$25,000,000.00 issued by FAB.
10. Each of the originally executed 8.90% Senior Notes, Series B due December 1, 1992, in the aggregate principal amount of \$5,000,000.00 issued by FAB.
11. Each of the originally executed 9.21% Senior Notes, Series C due by December 1, 1993, in the aggregate principal amount of \$27,500,000.00 issued by FAB.
12. Each of the originally executed 9.40% Senior Notes, Series D due December 1, 1994, in the aggregate principal amount of \$24,000,000.00 issued by FAB.

SCHEDULE 4Other Defendants

Abdullah Darwaish  
Ali Mohammad Shorafa  
Sheikh Humaid Bin Rashid Al-Nuaimi  
The Estate of Sheikh Rashid Bin Said Al-Maktoum  
Stock Holding Company  
Sheikh Mohammed Bin Rashid Al-Maktoum  
Crescent Holding Company  
Sheikh Hamad Bin Mohammed Al-Sharqi  
Mashriq Holding Company, S.A.  
Sheikh Kamal Ibrahim Adham  
Adham Corporation  
Abdul Raouf Khalil  
Sayed Jawhary (El Sayed El Gohari)  
Faisal Saud Al-Fulaij  
Gulf Investment & Real Estate Company  
Real Estate Development Company  
Sheikh Khalid Bin Mahfouz  
Estate of Mohammed Mahmoud Hammoud  
Agha Hasan Abedi  
Swaleh Naqvi  
Zafar Iqbal Chaudhri  
Ghaith R. Pharaon  
Clark M. Clifford  
Robert A. Altman

ASSIGNMENT AGREEMENT

This Agreement dated January 21, 1994 (the "Effective Date"), by and among H.H. Sheikh Zayed bin Sultan Al-Nahyan, acting through his attorney-in-fact (the "Assignor"), First American Corporation, a Virginia corporation ("FAC"), and Credit and Commerce American Investments B.V., a Netherlands company ("CCAI").

RECITALS:

A. Assignor is the assignee of all of the right, title and interest of Banque Arabe et Internationale d'Investissement, a French banking corporation ("BAII"), in and to a loan made to FAC pursuant to a certain Loan Agreement dated as of October 20, 1982, by and among BAII, certain other banks, FAC, and CCAI, in the original principal amount of U.S. \$50,000,000 (the "BAII Loan").

B. Pursuant to a certain Settlement Agreement of even date herewith among Assignor, FAC, CCAI and certain other parties (the "Settlement Agreement"), Assignor has agreed to assign to FAC all of his right, title and interest in and to the BAII Loan, all according to the terms of this Agreement.

C. According to the books and records of FAC, no principal or interest has been paid to Assignor with respect to the BAII Loan.

D. The Assignor has diligently searched for, but has not found, any original documentation evidencing the BAII Loan.

NOW THEREFORE, in consideration of these premises, Assignor, FAC and CCAI hereby agree as follows:

1. Assignment. Effective as of the Effective Date, Assignor hereby transfers and assigns to FAC all of Assignor's right, title and interest in and to (a) the BAII Loan, all outstanding principal and all interest owing to Assignor thereunder and all collateral security securing the obligations thereunder, and any and all documents relating thereto together with all of Assignor's right, title and interest in and to any and all claims with respect thereto and (b) the Assignment Agreement dated March 23, 1992 between BAII and Assignor (collectively, (a) and (b) are the "Assigned Debt"). FAC and CCAI hereby acknowledge and FAC hereby accepts said transfer and assignment.

2. No Implied Warranties. Except for the representations and warranties expressly made in Section 3 hereof, Assignor makes no representations or warranties, either express

EXHIBIT A

or implied, with respect to the BAII Loan; and, without limiting the generality of the foregoing, Assignor makes no representation or warranty as to any amounts owing under, or the validity or collectability of, the BAII Loan.

**3. Representations, Warranties and Further Assurances of Assignor.** Assignor represents and warrants to FAC that except for the assignment to FAC provided for herein, Assignor has not transferred or assigned and will not transfer or assign any of his legal or beneficial right, title or interest in or to, under or by reason of the Assigned Debt to any person or entity, and that, to the best of his knowledge, Assignor is the holder of the Assigned Debt. Assignor represents and warrants to FAC that, to the best of his actual knowledge and without having conducted any investigation with respect thereto, he has not received, during the period from March 23, 1992 through the Effective Date, any written notification from any person or entity that any third party has a claim against FAC or CCAI with respect to amounts owing under the Assigned Debt; provided, however, that this representation and warranty shall not be deemed to include, and shall have no force or effect with respect to, any third party claims which, as of or prior to the Effective Date, are or were known to any Current First American Releasee (as defined in the Settlement Agreement), or which, based upon documents and records currently in the possession of any Current First American Releasee reasonably should have been known to a Current First American Releasee.

**4. Miscellaneous Provisions.**

(a) **Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of the successors and assigns of each of the parties.

(b) **Entire Agreement.** This Agreement, together with the Release to which it is attached and its Schedules and Exhibits, constitute and contain the entire agreement of the parties regarding the subject matter hereof.

(c) **Counterparts.** This Agreement may be executed in any number of counterparts, whether transmitted by telecopier or otherwise, each of which shall be deemed to be an original, and all of which together shall be deemed to be one and the same instrument.

(d) **Governing Law.** This Agreement will be governed by and construed in accordance with the laws of the State of New York, without regard to its principles concerning conflicts of laws, and any actions under this Release shall be brought exclusively in the United States District Court for the District of Columbia.

(e) **Headings.** Paragraph headings in this Agreement have been inserted for convenience of reference only and shall in no way restrict or otherwise affect the construction or interpretation of any of the terms or provisions hereof.

(f) **No Admission of Liability.** Nothing in this Agreement is or shall be construed as an admission of liability, a waiver of any rights and privileges attendant to the sovereign status of any of the Abu Dhabi Parties or submission to the jurisdiction of any court in the United States. The execution of this Agreement shall not be deemed as an admission of or as conferring upon the DPA any juridical status or the capacity to sue or be sued, or to waive any defense relating thereto.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and delivered by their duly authorized representatives, all as of the day and year first above written.

**H.H. SHEIKH ZAYED BIN SULTAN AL-NAHYAN**

By: \_\_\_\_\_

Name: Ghanim Faris Al Mazrui  
Attorney-in-Fact and Chairman of the Department  
of Private Affairs of H.H. Sheikh Zayed bin Sultan  
Al-Nahyan

**FIRST AMERICAN CORPORATION**

By: \_\_\_\_\_

**CREDIT AND COMMERCE AMERICAN  
INVESTMENTS B.V.**

By: \_\_\_\_\_

EXHIBIT BFORM OF IRREVOCABLE STOCK POWER

FOR VALUE RECEIVED, the undersigned hereby irrevocably and unconditionally sells, assigns and transfers herewith, any and all right, title and interest in and to

\_\_\_\_\_ shares of the common stock of \_\_\_\_\_, a Virginia corporation, standing in the name of \_\_\_\_\_ on the books of said company and represented by certificate(s) number(s) \_\_\_\_\_, to \_\_\_\_\_, and does hereby irrevocably appoint Kenneth J. Ayres its agent and attorney-in-fact to transfer this stock on the books of the Company. The agent and attorney-in fact may appoint another to act for him.

Dated: \_\_\_\_\_

[Signature blocks for appropriate parties:]

EXHIBIT CUNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	
v.	)	Criminal No.
BCCI HOLDINGS (LUXEMBOURG), S.A.,	)	91-0655 (JHG)
BANK OF CREDIT AND COMMERCE	)	
INTERNATIONAL, S.A.,	)	
BANK OF CREDIT AND COMMERCE	)	
INTERNATIONAL (OVERSEAS) LIMITED,	)	
INTERNATIONAL CREDIT AND INVESTMENT	)	
COMPANY (OVERSEAS) LIMITED,	)	
Defendants.	)	
	)	

STIPULATION REQUESTING RELEASE OF  
FAC STOCK CERTIFICATE TO TRUSTEE

The Trustee of First American Corporation, Harry W. Albright Jr. (the "Trustee"), through undersigned counsel, and the law firm of Patton, Boggs & Blow ("Patton, Boggs"), as original bailee (for its client H.H. Sheikh Zayed bin Sultan Al-Nahyan acting through the Chairman of the Department of Private Affairs of H.H. Sheikh Zayed bin Sultan Al-Nahyan), of a certain stock certificate issued in the name of "Harry W. Albright, Jr. as Trustee Appointed by Order of the U.S. District Court for the District of Columbia Dated June 23, 1992" and certifying his ownership as Trustee appointed by the Court of 100 shares of issued and outstanding capital stock of First American Corporation, a Virginia corporation (the "FAC Stock Certificate), hereby stipulate and agree (1) that the FAC Stock Certificate is held by the Finance Office of the Clerk's Office of the United States District

Court for the District of Columbia pursuant to the Court's Order dated January 8, 1993 and Praeclipe filed on January 13, 1993; (2) that H.H Sheikh Zayed bin Sultan Al-Nahyan acting through the Chairman of the Department of Private Affairs of H.H. Sheikh Zayed bin Sultan Al-Nahyan no longer claims a security interest in the FAC Stock Certificate; and (3) that the FAC Stock Certificate may be released to the Trustee by the Finance Office of the Clerk's Office of this Court. Therefore, the Trustee and Patton Boggs hereby request that the FAC Stock Certificate be released from the custody of this Court and delivered to the Trustee.

Respectfully submitted,

---

Sol Neil Corbin  
CORBIN, SILVERMAN & SANSEVERINO  
805 Third Avenue  
New York, New York 10022  
(212) 308-5000

Counsel to Harry W. Albright, Jr.,  
Trustee of First American Corporation

---

Jean V. MacHarg  
D.C. Bar No. 358660  
PATTON, BOGGS & BLOW  
2550 M Street, N.W.  
Washington, D.C. 20037  
(202) 457-6000

On behalf of

Patton, Boggs & Blow, original  
Bailee

Date: January \_\_\_, 1994

So Ordered:

---

Date

---

United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
FIRST AMERICAN CORPORATION, )  
et al., )  
Plaintiffs, )  
v. ) Civil Action No. 93-1309  
SHEIKH ZAYED BIN SULTAN AL-NAHYAN, ) Hon. Joyce Hens Green  
et al., )  
Defendants. )  
\_\_\_\_\_

NOTICE OF DISMISSAL

Pursuant to Rule 41(a)(1), Fed. R. Civ. P., Plaintiffs First American Corporation (on its own behalf and on behalf of its sole shareholder, the Court-appointed Trustee of First American Corporation) and First American Bankshares, Inc. hereby dismiss with prejudice the claims asserted in this action against Defendants Sheikh Zayed bin Sultan Al-Nahyan, Sheikh Khalifa bin Zayed Al-Nahyan, Sheikh Sultan bin Zayed Al-Nahyan, the Abu Dhabi Investment Authority, Ghanim Faris al Mazrui and the Department of Private Affairs of H.H. Sheikh Zayed bin Sultan Al Nahyan, each party to bear its own costs. This notice of

dismissal is not intended to dismiss Plaintiffs' claims as asserted against any Defendant in this action who is not identified above.

The relevant Settlement Agreement and Mutual Release is attached hereto as Annex A.

---

Stephen J. Brogan (#939082)  
Mary Ellen Powers (#334045)  
JONES, DAY, REAVIS & POGUE  
1450 G Street, N.W.  
Washington, D.C. 20005-2088  
(202) 879-3939

Counsel for Plaintiffs  
First American Corporation and  
First American Bankshares, Inc.

January \_\_\_, 1994

**MUTUAL RELEASE  
(FOR INDEMNITEES)**

THIS MUTUAL RELEASE (this "Mutual Release"), dated as of \_\_\_\_\_, 1994, is by and among, (1) \_\_\_\_\_ (the "Director"), and (2) H.H. Sheikh Zayed bin Sultan Al-Nahyan, H.H. Sheikh Khalifa bin Zayed Al-Nahyan, H.H. Sheikh Sultan bin Zayed Al-Nahyan, H.H. Sheikh Mohammed bin Zayed Al-Nahyan, H.E. Ghanim Faris al Mazrui, the Abu Dhabi Department of Finance, the Abu Dhabi Investment Authority ("ADIA"), and the Department of Private Affairs of H.H. Sheikh Zayed bin Sultan Al-Nahyan (the "DPA"), (collectively, the "Abu Dhabi Parties").

**WITNESSETH:**

WHEREAS, Director is a [former/current] officer and/or director of one or more of the following corporations: Credit and Commerce American Holdings, N.V., a Netherlands Antilles corporation ("CCAH"), Credit and Commerce American Investment, B.V., a Netherlands corporation ("CCAI"), First American Corporation, a Virginia corporation ("FAC") and First American Bankshares, Inc., a Virginia corporation ("FAB"), (collectively, the "First American Companies");

WHEREAS, certain of the Abu Dhabi Parties and the Director are parties to an Indemnity Agreement a copy of which is attached as Exhibit A hereto (the "Indemnity Agreement"), pursuant to which such Abu Dhabi Parties agreed to guarantee certain indemnity obligations owed by one or more of the First American Companies to the Director and to establish a related escrow fund in furtherance of said guarantee;

WHEREAS, pursuant to a certain Settlement Agreement and Mutual Release dated January \_\_, 1994, by and among the Abu Dhabi Parties, the First American Companies and the trustee appointed by the United States District Court for the District of Columbia pursuant to the Order Appointing Trustee, entered by said court on June 23, 1992 (the "Settlement Agreement"), a copy of which has been delivered to the Director, the Abu Dhabi Parties agreed to release the First American Companies from certain claims;

WHEREAS, the releases granted by the Abu Dhabi Parties to the First American Companies under the Settlement Agreement do not release any claims the Abu Dhabi Parties have or may have against the Director arising out of the Indemnity Agreement (and, if Director was not an officer and/or director upon the Effective Date of the Settlement Agreement, any claims whatsoever) unless and until he and the Abu Dhabi Parties agree to execute and deliver a general mutual release substantially in the form of this Mutual Release; and

EXHIBIT F-1

WHEREAS, the Director and the Abu Dhabi Parties desire to terminate, cancel and release all of the Director's rights and claims against all of the Abu Dhabi Parties under the Indemnity Agreement and release any and all claims each may have against the other, all according to the terms of this Mutual Release.

NOW THEREFORE, for and in consideration of the premises and of the mutual promises, releases and agreements herein contained, the parties hereto agree as follows:

**Section 1. Termination of Indemnity Agreement.** The Director and the Abu Dhabi Parties hereby permanently, irrevocably and unconditionally agree to terminate, cancel and extinguish any and all of the Director's rights and privileges as to any of the Abu Dhabi Parties under the Indemnity Agreement, such that the Director shall no longer have any right to request or receive indemnification or any payment from, or exercise any right against, any of the Abu Dhabi Parties by reason of the Indemnity Agreement, and the Abu Dhabi Parties shall no longer be under any obligation to indemnify or guarantee any obligation of the First American Companies to indemnify the Director or maintain the Escrow Fund (as defined in the Indemnity Agreement) for the Director's benefit.

**Section 2. Release by the Director.** The Director, for himself, his heirs, executors, administrators, successors, assigns, agents and affiliates hereby permanently, irrevocably and unconditionally releases and forever discharges the Abu Dhabi Parties, their present and former subsidiaries and each of their respective heirs, executors, administrators, predecessors, successors, divisions, assigns, and affiliates and their present and former officers, directors, shareholders, employees, advisors, attorneys and agents (hereinafter collectively termed the "Abu Dhabi Releasees") from any and all manner of claims, demands, damages, actions, causes of action, contracts, agreements, charges, sums of money, claims for attorneys' fees and lawsuits of every kind and description whatsoever, in law or equity, whether known or unknown, now existing or which may hereafter arise against the Abu Dhabi Releasees, or any of them, under the laws of the United States, any State thereof, or any other jurisdiction, for or by reason of any matter, cause, or thing whatsoever prior to the date hereof, including, without limitation, any of the claims asserted against the Abu Dhabi Parties in the Litigation (as defined in the Settlement Agreement) and any claims arising out of or having connection in any way whatsoever with the Indemnity Agreement, regardless of whether future damages may result therefrom.

**Section 3. Reservation of Rights by the Director.** By the release set forth in Section 2 hereof, the Director releases claims only against the Abu Dhabi Releasees. The Director expressly reserves all rights, claims, causes of action and damages that he has or may have against the Other Defendants (as defined in the Settlement Agreement) and the First American Companies.

**Section 4. Release by the Abu Dhabi Parties.** The Abu Dhabi Parties, individually and in their official capacities, for themselves, their respective heirs, executors, administrators, successors, divisions, assigns and controlled affiliates and their respective officers, directors and agents hereby permanently, irrevocably and unconditionally release

EXHIBIT E-1

and forever discharge the Director and his heirs, executors, administrators, successors, assigns, employees, advisors, attorneys and agents (but not including the Other Defendants, whom the parties hereto expressly agree and acknowledge are not intended beneficiaries of this Release) (hereinafter collectively termed the "Director Releasees") from any and all manner of claims, demands, damages, actions, causes of action, contracts, agreements, charges, sums of money, claims for attorneys' fees and lawsuits of every kind and description whatsoever, in law or equity, whether known or unknown, now existing or which may hereafter arise against the Director Releasees, or any of them, under the laws of the United States, any State thereof, or any other jurisdiction, for or by reason of any matter, cause, or thing whatsoever prior to the date hereof, regardless of whether future damages may result therefrom.

**Section 5. Reservation of Rights by the Abu Dhabi Parties.** By the release set forth in Section 4 hereof, the Abu Dhabi Parties release claims only against the Director Releasees. The Abu Dhabi Parties expressly reserve all rights, claims, causes of action and damages that they may have against (i) the Other Defendants (unless such Other Defendant and the Abu Dhabi Parties have executed and delivered a mutual release substantially in the form of this Mutual Release), (ii) any current or former record shareholder of CCAH or (iii) BCCI, which, for the purposes of this Mutual Release shall mean (a) BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Ltd., ICIC Apex Holdings Ltd., International Credit and Commerce Company (Overseas) Ltd., and/or any one or more of either of their direct or indirect affiliates, subsidiaries or parent companies (but not including the First American Companies and their subsidiaries) and (b) the court-appointed liquidators of the Bank of Credit and Commerce International, S.A. in Luxembourg and in England, the court-appointed liquidators of BCCI Holdings (Luxembourg), S.A. in Luxembourg, and the court-appointed liquidators of the Bank of Credit and Commerce International (Overseas) Ltd., in the Cayman Islands. The Abu Dhabi Parties expressly reserve all rights, claims, causes of action and damages that they may have against all others.

**Section 6. Representation.** Each party hereto represents and warrants that it has all requisite power and authority to enter into this Mutual Release and that the execution and delivery by the individuals executing this Mutual Release have been duly authorized.

**Section 7. Further Assurances.** Each party hereto agrees to execute and deliver all documents and instruments and to take or cause to be taken such other actions as are reasonably necessary or appropriate to consummate the agreements and releases contemplated by this Mutual Release.

**Section 8. Effective Date.** This Mutual Release shall be effective as of the date and year first above set forth.

**Section 9. Non-Assignment.** The Director Releasees represent and warrant to the Abu Dhabi Releasees that they have not assigned or transferred, and will not assign or transfer, any claim they have or may have against any of the Abu Dhabi Releasees to any

EXHIBIT E-1

other person or entity. Likewise, the Abu Dhabi Releasees represent and warrant that they have not assigned or transferred, and will not assign or transfer, any claim they have or may have against the Director to any other person or entity.

**Section 10. No Admission of Liability.** Nothing in this Mutual Release is or shall be construed as an admission of liability, a waiver of the rights and privileges attendant to the sovereign status of the Abu Dhabi Parties or submission to the jurisdiction of any court in the United States. The execution of this Mutual Release on behalf of the DPA shall not be deemed as an admission of or as conferring upon the DPA any juridical status or the capacity to sue or be sued, or to waive any defense relating thereto.

**Section 11. Amendment and Waiver.** This Mutual Release may be amended, modified, waived, discharged or terminated only by an instrument in writing signed by all of the parties hereto.

**Section 12. Beneficiaries, Successors and Assigns.** This Mutual Release shall inure to the benefit of the parties hereto and their respective subsidiaries, officers, directors, attorneys, employees, agents, trustees, successors and assigns.

**Section 13. Entire Agreement.** This Mutual Release constitutes the entire agreement among the parties with respect to the subject matter hereof, and there are no agreements among the parties hereto with respect thereto except as expressly set forth herein. No representations, either oral or written, except those contained expressly in this Mutual Release, were made to induce any of the parties to enter into this Mutual Release.

**Section 14. Severability; Enforceability.** In case any provision contained in this Mutual Release is held to be illegal, invalid or unenforceable under present or future laws effective while this Mutual Release remains in effect, the legality, validity and enforceability of the remaining provisions will not in any way be affected or impaired thereby, and in lieu of each such illegal, invalid or unenforceable provision the parties shall negotiate in good faith to add a provision that is legal, valid and enforceable and as similar in terms to such illegal, invalid or unenforceable provision as may be possible while giving effect to the benefits and burdens for which the parties have bargained hereunder.

**Section 15. Governing Law.** This Mutual Release will be governed by and construed in accordance with the laws of the State of New York, without regard to its principles concerning conflicts of laws, and any actions under this Mutual Release shall be brought in the United States District Court for the District of Columbia.

**Section 16. Counterparts.** This Mutual Release may be executed in any number of counterparts, whether transmitted by telecopier or otherwise, each of which shall be deemed to be an original, and all of which together shall be deemed to be one and the same instrument.

EXHIBIT E-1

**Section 17. Notices.** All notices, communications and requests under this Mutual Release shall be made to:

- (a) on behalf of the Director:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- (b) on behalf of the Abu Dhabi Parties:

Jean V. MacHarg  
Patton, Boggs & Blow  
2550 M Street N.W.  
Washington, D.C. 20037

**Section 18. Delivery to First American.** Promptly upon the execution and delivery of this Mutual Release, the Abu Dhabi Parties shall cause a copy of this Mutual Release to be delivered to the First American Companies, as follows:

First American Corporation  
740 15th Street, N.W.  
Washington, D.C. 20005  
Attn: Corporate Secretary

IN WITNESS WHEREOF, the parties hereto have caused this Mutual Release to be executed and delivered, all as of the day and year first above written.

**MUTUAL RELEASE  
(FOR NON-INDEMNITEES)**

THIS MUTUAL RELEASE (this "Mutual Release"), dated as of \_\_\_\_\_, 1994, is by and among, (1) \_\_\_\_\_ (the "Director"), and (2) H.H. Sheikh Zayed bin Sultan Al-Nahyan, H.H. Sheikh Khalifa bin Zayed Al-Nahyan, H.H. Sheikh Sultan bin Zayed Al-Nahyan, H.H. Sheikh Mohammed bin Zayed Al-Nahyan, H.E. Ghanim Faris al Mazrui, the Abu Dhabi Department of Finance, the Abu Dhabi Investment Authority ("ADIA"), and the Department of Private Affairs of H.H. Sheikh Zayed bin Sultan Al-Nahyan (the "DPA"), (collectively, the "Abu Dhabi Parties").

**WITNESSETH:**

WHEREAS, Director is a former officer, director and/or counsel of one or more of the following corporations: Credit and Commerce American Holdings, N.V., a Netherlands Antilles corporation ("CCAH"), Credit and Commerce American Investment, B.V., a Netherlands corporation ("CCAI"), First American Corporation, a Virginia corporation ("FAC") and First American Bankshares, Inc., a Virginia corporation ("FAB"), (collectively, the "First American Companies");

WHEREAS, pursuant to a certain Settlement Agreement and Mutual Release dated January \_\_\_, 1994, by and among the Abu Dhabi Parties, the First American Companies and the trustee appointed by the United States District Court for the District of Columbia pursuant to the Order Appointing Trustee, entered by said court on June 23, 1992 (the "Settlement Agreement"), a copy of which has been delivered to the Director, the Abu Dhabi Parties agreed to release the First American Companies from certain claims;

WHEREAS, the releases granted by the Abu Dhabi Parties to the First American Companies under the Settlement Agreement do not release any claims the Abu Dhabi Parties have or may have against the Director unless and until he and the Abu Dhabi Parties execute and deliver a general mutual release substantially in the form of this Mutual Release; and

WHEREAS, the Director and the Abu Dhabi Parties desire to release any and all claims each may have against the other, all according to the terms of this Mutual Release.

NOW THEREFORE, for and in consideration of the premises and of the mutual promises, releases and agreements herein contained, the parties hereto agree as follows:

**Section 1. Release by the Director.** The Director, for himself, his heirs, executors, administrators, successors, assigns, agents and affiliates hereby permanently, irrevocably and unconditionally releases and forever discharges the Abu Dhabi Parties, their present and former subsidiaries and each of their respective heirs, executors, administrators, predecessors, successors, divisions, assigns, and affiliates and their present and former officers, directors, shareholders, employees, advisors, attorneys and agents

EXHIBIT E-2

(hereinafter collectively termed the "Abu Dhabi Releasees") from any and all manner of claims, demands, damages, actions, causes of action, contracts, agreements, charges, sums of money, claims for attorneys' fees and lawsuits of every kind and description whatsoever, in law or equity, whether known or unknown, now existing or which may hereafter arise against the Abu Dhabi Releasees, or any of them, under the laws of the United States, any State thereof, or any other jurisdiction, for or by reason of any matter, cause, or thing whatsoever prior to the date hereof, including, without limitation, any of the claims asserted against the Abu Dhabi Parties in the Litigation (as defined in the Settlement Agreement), regardless of whether future damages may result therefrom.

**Section 2. Reservation of Rights by the Director.** By the release set forth in Section 1 hereof, the Director releases claims only against the Abu Dhabi Releasees. The Director expressly reserves all rights, claims, causes of action and damages that he has or may have against the Other Defendants (as defined in the Settlement Agreement).

**Section 3. Release by the Abu Dhabi Parties.** The Abu Dhabi Parties, individually and in their official capacities, for themselves, their respective heirs, executors, administrators, successors, divisions, assigns and controlled affiliates and their respective officers, directors and agents hereby permanently, irrevocably and unconditionally release and forever discharge the Director and his heirs, executors, administrators, successors, assigns, employees, advisors, attorneys and agents (but not any other individual or entity listed on Schedule 4 to the Settlement Agreement, whom the parties hereto expressly agree and acknowledge are not intended beneficiaries of this Release) (hereinafter collectively termed the "Director Releasees") from any and all manner of claims, demands, damages, actions, causes of action, contracts, agreements, charges, sums of money, claims for attorneys' fees and lawsuits of every kind and description whatsoever, in law or equity, whether known or unknown, now existing or which may hereafter arise against the Director Releasees, or any of them, under the laws of the United States, any State thereof, or any other jurisdiction, for or by reason of any matter, cause, or thing whatsoever prior to the date hereof, regardless of whether future damages may result therefrom.

**Section 4. Reservation of Rights by the Abu Dhabi Parties.** By the release set forth in Section 3 hereof, the Abu Dhabi Parties release claims only against the Director Releasees. The Abu Dhabi Parties expressly reserve all rights, claims, causes of action and damages that they may have against (i) any other individual or entity listed on Schedule 4 to the Settlement Agreement, (ii) any other current or former record shareholder of CCAH or (iii) BCCI, which, for the purposes of this Mutual Release shall mean (a) BCCI Holdings (Luxembourg), S.A., Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Ltd., ICIC Apex Holdings Ltd., International Credit and Commerce Company (Overseas) Ltd., and/or any one or more of either of their direct or indirect affiliates, subsidiaries or parent companies (but not including the First American Companies and their subsidiaries) and (b) the court-appointed liquidators of the Bank of Credit and Commerce International, S.A. in Luxembourg and in England, the court-appointed liquidators of BCCI Holdings (Luxembourg), S.A. in Luxembourg, and the court-appointed liquidators of the Bank of Credit and Commerce International (Overseas)

EXHIBIT E-2

Ltd., in the Cayman Islands. The Abu Dhabi Parties expressly reserve all rights, claims, causes of action and damages that they may have against all others.

**Section 5. Representation.** Each party hereto represents and warrants that it has all requisite power and authority to enter into this Mutual Release and that the execution and delivery by the individuals executing this Mutual Release have been duly authorized.

**Section 6. Further Assurances.** Each party hereto agrees to execute and deliver all documents and instruments and to take or cause to be taken such other actions as are reasonably necessary or appropriate to consummate the agreements and releases contemplated by this Mutual Release.

**Section 7. Effective Date.** This Mutual Release shall be effective as of the date and year first above set forth.

**Section 8. Non-Assignment.** The Director Releasees represent and warrant to the Abu Dhabi Releasees that they have not assigned or transferred, and will not assign or transfer, any claim they have or may have against any of the Abu Dhabi Releasees to any other person or entity. Likewise, the Abu Dhabi Releasees represent and warrant that they have not assigned or transferred, and will not assign or transfer, any claim they have or may have against the Director to any other person or entity.

**Section 9. No Admission of Liability.** Nothing in this Mutual Release is or shall be construed as an admission of liability, a waiver of the rights and privileges attendant to the sovereign status of the Abu Dhabi Parties or submission to the jurisdiction of any court in the United States. The execution of this Mutual Release on behalf of the DPA shall not be deemed as an admission of or as conferring upon the DPA any juridical status or the capacity to sue or be sued, or to waive any defense relating thereto.

**Section 10. Amendment and Waiver.** This Mutual Release may be amended, modified, waived, discharged or terminated only by an instrument in writing signed by all of the parties hereto.

**Section 11. Beneficiaries, Successors and Assigns.** This Mutual Release shall inure to the benefit of the parties hereto and their respective subsidiaries, officers, directors, attorneys, employees, agents, trustees, successors and assigns.

**Section 12. Entire Agreement.** This Mutual Release constitutes the entire agreement among the parties with respect to the subject matter hereof, and there are no agreements among the parties hereto with respect thereto except as expressly set forth herein. No representations, either oral or written, except those contained expressly in this Mutual Release, were made to induce any of the parties to enter into this Mutual Release.

**Section 13. Severability; Enforceability.** In case any provision contained in this Mutual Release is held to be illegal, invalid or unenforceable under present or future laws

EXHIBIT F-2

effective while this Mutual Release remains in effect, the legality, validity and enforceability of the remaining provisions will not in any way be affected or impaired thereby, and in lieu of each such illegal, invalid or unenforceable provision the parties shall negotiate in good faith to add a provision that is legal, valid and enforceable and as similar in terms to such illegal, invalid or unenforceable provision as may be possible while giving effect to the benefits and burdens for which the parties have bargained hereunder.

**Section 14. Governing Law.** This Mutual Release will be governed by and construed in accordance with the laws of the State of New York, without regard to its principles concerning conflicts of laws, and any actions under this Mutual Release shall be brought in the United States District Court for the District of Columbia .

**Section 15. Counterparts.** This Mutual Release may be executed in any number of counterparts, whether transmitted by telecopier or otherwise, each of which shall be deemed to be an original, and all of which together shall be deemed to be one and the same instrument.

**Section 16. Notices.** All notices, communications and requests under this Mutual Release shall be made to:

(a) on behalf of the Director:

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(b) on behalf of the Abu Dhabi Parties:

Jean V. MacHarg  
Patton, Boggs & Blow  
2550 M Street N.W.  
Washington, D.C. 20037

**Section 17. Delivery to First American.** Promptly upon the execution and delivery of this Mutual Release, the Abu Dhabi Parties shall cause a copy of this Mutual Release to be delivered to the First American Companies, as follows:

First American Corporation  
740 15th Street, N.W.  
Washington, D.C. 20005  
Attn: Corporate Secretary

EXHIBIT E-2

IN WITNESS WHEREOF, the parties hereto have caused this Mutual Release to be executed and delivered, all as of the day and year first above written.

EXHIBIT FJOINT PRESS RELEASE

Abu Dhabi, First American Bankshares, Inc. and the Court-appointed trustee of First American Corporation, Harry W. Albright Jr. have today entered into and filed with the United States District Court for the District of Columbia a Settlement Agreement and Mutual Release in accordance with the agreement entered into among Abu Dhabi, First American Bankshares, Inc., the First American Trustee, the United States Department of Justice, the New York County District Attorney's Office and the Board of Governors of the Federal Reserve System in Geneva on January 8, 1994.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Notice of Dismissal, was served via first-class mail, postage prepaid, or as otherwise stated, this 21st day of January, 1994, on the following:

Jean V. MacHarg  
PATTON, BOGGS & BLOW  
2550 M Street, N.W.  
Washington, D.C. 20037  
(202) 457-6000

**Counsel for H.H. Sheikh Zayed bin Sultan Al-Nahyan, H.H. Sheikh Khalifa bin Zayed Al-Nahyan, H.H. Sheikh Sultan bin Zayed Al-Nahyan, the Department of Private Affairs of H.H. Sheikh Zayed bin Sultan Al-Nahyan, the Abu Dhabi Investment Authority, and H.E. Ghanim Faris Al-Mazrui**

James J. Murphy  
BRYAN CAVE  
700 Thirteenth Street, N.W.  
Washington, D.C. 20005-3960  
(202) 508-6000

**Counsel for Sheikh Humaid Bin Rashid Al-Nuaimi, Sheikh Hamad Bin Mohammed Al-Sharqi and Mashriq Holding Company, S.A.**

John T. Szymkowicz  
SZYMKOWICZ & BUFFINGTON  
1250 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 862-9820

**Counsel for H.E. Ali M. Al Shorafa**

Herbert J. Miller, Jr.  
MILLER, CASSIDY, LARRACO & LEWIN  
2555 M Street, N.W.  
Washington, D.C. 20037  
(202) 293-6400

**Counsel for Clark M. Clifford and Robert A. Altman**

ESTATE OF SHEIKH RASHID BIN SAID AL-MAKTOUM  
Za'beel Palace  
Dubai, United Arab Emirates

STOCK HOLDING COMPANY  
c/o Estate of Sheikh Rashid bin Zaid Al-Maktoum  
Za'beel Palace  
Dubai, United Arab Emirates

SHEIKH MOHAMMED BIN RASHID AL-MAKTOUM  
Za'beel Palace  
Dubai, United Arab Emirates

CRESCENT HOLDING COMPANY  
c/o Sheikh Mohammed bin Rashid Al-Maktoum  
Za'beel Palace  
Dubai, United Arab Emirates

SHEIKH HAMAD BIN MOHAMMED AL-SHARQI  
Post Office Box One  
Fujairah, United Arab Emirates

SHEIKH KAMAL IBRAHIM ADHAM  
Post Office Box 478  
Jeddah, Saudi Arabia 21411

ADHAM CORPORATION  
Post Office Box 478  
Jeddah, Saudi Arabia 21411

SAYED JAWHARY (EL SAYED EL GOHARI)  
Post Office Box 6126  
Jeddah, Saudi Arabia 21442

FAISAL SAUD AL-FULAIJ  
c/o El Gezirah Sheraton Hotel  
Post Office Box 264 El Orman Giza  
Cairo, Egypt

GULF INVESTMENT & REAL ESTATE COMPANY  
Post Office Box 24443  
Safat 13105, Kuwait

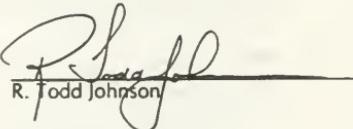
REAL ESTATE DEVELOPMENT COMPANY  
Post Office Box 25667  
Safat 13105, Kuwait

SHEIKH KHALID BIN MAHFOUD  
Post Office Box 3555  
Jeddah, Saudi Arabia

ESTATE OF MOHAMMED MAHMOUD HAMMOUD  
c/o Kassem M. Hammoud  
22 Norfolk Crescent  
London W2 2DN  
England

SWALEH NAQVI  
c/o U.A.E Federal Prosecutor  
Ministry of Justice  
Post Office Box 753  
Abu Dhabi, United Arab Emirates

ZAFAR IQBAL CHAUDHRI  
c/o U.A.E. Federal Prosecutor  
Ministry of Justice  
Post Office Box 753  
Abu Dhabi, United Arab Emirates



R. Todd Johnson

A handwritten signature in black ink, appearing to read "R. Todd Johnson". The signature is fluid and cursive, with a long, sweeping flourish on the left side.

HENRY B. GONZALEZ, TEXAS, CHAIRMAN  
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 (02) 225-4247

**U.S. HOUSE OF REPRESENTATIVES**  
**COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS**

ONE HUNDRED THIRD CONGRESS  
 2129 RAYBURN HOUSE OFFICE BUILDING  
 WASHINGTON, DC 20515-6050

November 30, 1993

Honorable Janet Reno  
 Attorney General of the U.S.  
 Washington, D.C. 20530

Dear Madam Attorney General:

The Committee on Banking, Finance and Urban Affairs will hold a hearing on Thursday, December 9, 1993, to discuss the State Department's consideration of a request for head of state immunity by Sheikh Zayed Bin Sultan Al-Nahyan, et al., related to their role in the Bank of Credit and Commerce International scandal. I respectfully request that you or your designee testify at the hearing.

The Committee would like to better understand the government's decision making process related to requests for head of state immunity, particularly when the party making the request is seeking to avoid accountability for conduct related to State and Federal government-regulated commercial enterprises such as banking.

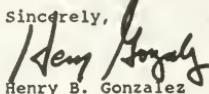
So that the Committee may better understand the decision making process related to grants of head of state immunity, please address the following questions in your written testimony.

1. Please define head of state immunity and provide an overview of your agency's role in the decision making process used to consider such requests.
2. What factors does the Justice Department consider when making recommendations to the State Department on sovereign immunity cases?
  - a. Please explain how civil and potential criminal actions against the person(s) requesting head of state immunity impact the Justice Department's decision making process.
  - b. Our financial system is the lifeblood of our economy. When considering requests for head of state immunity, is special consideration given to violations of federal and state banking laws and regulations?

3. Does the Justice Department have a general position on whether the U.S. should immunize a foreign head of state against legal actions that are based on the subject's conduct within government-regulated industries such as banking, securities and insurance?
4. Please provide an overview of the actions, if any, taken by the Justice Department against the Emir of Abu Dhabi, et al., and a summary of their role in the BCCI scandal.

The hearing is scheduled to begin at 10:00 a.m. in Room 2128, Rayburn House Office Building. In accordance with Committee rules, please deliver 200 copies of your prepared statement by 10:00 a.m., December 8, 1993. Your entire written statement will be included in the hearing record and will be made available to all Committee members in advance of your appearance.

Thank you for your cooperation. The Committee looks forward to your testimony.

Sincerely,  
  
Henry B. Gonzalez  
Chairman

HBG:dk/jr

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**COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS**

**ONE HUNDRED THIRD CONGRESS**  
**2129 RAYBURN HOUSE OFFICE BUILDING**  
**WASHINGTON, DC 20515-6050**

November 30, 1993

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 SPENCER BACHUS, ALABAMA  
 MIKE KELLY, PENNSYLVANIA  
 MICHAEL CASTLE, DELAWARE  
 PETER KING, NEW YORK  
 BERNARD SANDERS, VERMONT  
 (202) 225-4247

The Honorable Alan Greenspan  
 Chairman, Board of Governors  
 of the Federal Reserve System  
 20th and Constitution Avenue, N.W.  
 Washington, D.C. 20551

Dear Chairman Greenspan:

The Committee on Banking, Finance and Urban Affairs will hold a hearing on Thursday, December 9, 1993, to discuss the State Department's consideration of a request for head of state immunity by Sheikh Zayed Bin Sultan Al-Nahyan, the Emir of Abu Dhabi, et al., related to their role in the Bank of Credit and Commerce International (BCCI) scandal. I respectfully request that you or your designee testify at the hearing.

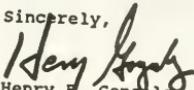
As the primary regulator of foreign banks, the Federal Reserve's views on granting head of state immunity to participants in the U.S. banking system are very important. Accordingly, please answer the following questions in your written testimony.

1. Please provide:
  - a. a summary of the BCCI scandal;
  - b. a summary of the enforcement actions taken to date by your agency related to BCCI; and
  - c. an overview of the actions, if any, taken against the Emir of Abu Dhabi, et al., and a summary of their role in the BCCI scandal.
2. Please explain the Federal Reserve's role in the decision making process for grants of sovereign or head of state immunity when such requests are from participants in the U.S. banking system.
3. Please explain how a grant of sovereign or head of state immunity would effect the Federal Reserve's ability to effectively regulate foreign government-owned banks in the future.

4. Please explain how a grant of sovereign or head of state immunity would effect the Federal Reserve's ability to bring enforcement actions against malefactors in the BCCI scandal.
5. Has the Federal Reserve taken a position regarding the request for head of state immunity from the Emir of Abu Dhabi, et al? Please explain.

The hearing is scheduled to begin at 10:00 a.m. in Room 2128, Rayburn House Office Building. In accordance with Committee rules, please deliver 200 copies of your prepared statement by 10:00 a.m., December 8, 1993. Your entire written statement will be included in the hearing record and will be made available to all Committee members in advance of your appearance.

Thank you for your cooperation. The Committee looks forward to your testimony.

Sincerely,  
  
Henry B. Gonzalez  
Chairman

HBG:dk/jr

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 LINDA WATT, SOUTH CAROLINA  
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 DPO 226-4242

## U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS

### ONE HUNDRED THIRD CONGRESS 2129 RAYBURN HOUSE OFFICE BUILDING WASHINGTON, DC 20515-6050

November 30, 1993

The Honorable Warren Christopher  
 Secretary of State  
 2201 C Street, N.W.  
 Washington, D.C. 20520

Dear Secretary Christopher:

The Committee on Banking, Finance and Urban Affairs will hold a hearing on Thursday, December 9, 1993, to discuss the State Department's consideration of a request for head of state immunity by Sheikh Zayed Bin Sultan Al-Nahyan, et al., related to their role in the Bank of Credit and Commerce International scandal. I respectfully request that you or your designee testify at the hearing.

The Committee would like to better understand the government's decision making process related to requests for head of state immunity, particularly when the party making the request is seeking to avoid accountability for conduct related to State and Federal government-regulated commercial enterprises such as banking.

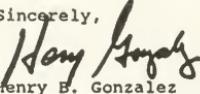
So that the Committee may better understand the decision making process related to grants of head of state immunity, please address the following questions in your written testimony.

1. Please define head of state immunity and provide an overview of the decision making process used to consider such requests. Is the Emir's request, or would granting his request for head of state immunity be precedent setting?
2. Please explain:
  - a. how civil and potential criminal actions against the person(s) requesting head of state immunity impact the State Department's decision making process.
  - b. Our financial system is the lifeblood of our economy. When considering requests for head of state immunity, is special consideration given to violations of federal and state banking laws and regulations?

3. Regarding the Emir of Abu Dhabi's request for head of state immunity, has the State Department sought the advice of the Federal Reserve and District Attorney's Office for the County of New York?

The hearing is scheduled to begin at 10:00 a.m. in Room 2128, Rayburn House Office Building. In accordance with Committee rules, please deliver 200 copies of your prepared statement by 10:00 a.m., December 8, 1993. Your entire written statement will be included in the hearing record and will be made available to all Committee members in advance of your appearance.

Thank you for your cooperation. The Committee looks forward to your testimony.

Sincerely,  
  
Henry B. Gonzalez  
Chairman

HBG:dk/jr

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 PAUL E. KARSHOFER, PENNSYLVANIA  
 JOSEPH E. KENNEDY, MASSACHUSETTS  
 LOYD K. PLAE, NEW YORK  
 ENTITLED TO A VOTE  
 MARINE WATKINS, CALIFORNIA  
 LARRY LANOCO, IDAHO  
 BILL DODGE, OHIO  
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ONE HUNDRED THIRD CONGRESS  
 2129 RAYBURN HOUSE OFFICE BUILDING  
 WASHINGTON, DC 20515-6050

November 30, 1993

Honorable Charles McC. Mathias  
 Chairman of the Board  
 First American Bankshares, Inc.  
 740 15th Street, N.W.  
 Washington, D.C. 20005

Dear Senator McC. Mathias:

The Committee on Banking, Finance and Urban Affairs will hold a hearing on Thursday, December 9, 1993, to discuss the State Department's consideration of a request for head of state immunity by Sheikh Zayed Bin Sultan Al-Nahyan, et al., related to their role in the Bank of Credit and Commerce International scandal. I respectfully request that you testify at the hearing.

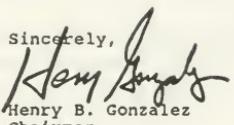
The Committee would like to better understand the issues related to the requests for head of state immunity by the Emir, et al. Accordingly, please address the following questions in your written testimony.

1. How would a grant of head of state immunity impact First American Bankshares.
2. Please describe the reasons why you believe Sheikh Zayed, et al., should not be granted head of state immunity related to their role in the BCCI scandal.
3. Would a grant of head of state immunity set a bad precedent as far as protecting the safety and soundness of our banking system?

The hearing is scheduled to begin at 10:00 a.m. in Room 2128, Rayburn House Office Building. In accordance with Committee rules, please deliver 200 copies of your prepared statement by 10:00 a.m., December 8, 1993. Your entire written statement will be included in the hearing record and will be made available to all Committee members in advance of your appearance.

Thank you for your cooperation. The Committee looks forward  
to your testimony.

Sincerely,

A handwritten signature in black ink, appearing to read "Henry B. Gonzalez".

Henry B. Gonzalez  
Chairman

HBG:dk/jr

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November 30, 1993

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(202) 225-4147

Mr. Harry W. Albright, Jr.  
 Trustee  
 First American Corporation  
 Suite 1914  
 1270 Avenue of the Americas  
 New York, NY 10020

Dear Mr. Albright:

The Committee on Banking, Finance and Urban Affairs will hold a hearing on Thursday, December 9, 1993, to discuss the State Department's consideration of a request for head of state immunity by Sheikh Zayed Bin Sultan Al-Nahyan, et al., related to their role in the Bank of Credit and Commerce International scandal. I respectfully request that you testify at the hearing.

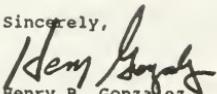
The Committee would like to better understand the issues related to the requests for head of state immunity by the Emir, et al. Accordingly, please address the following questions in your written testimony.

1. Please summarize your role as Trustee for First American Corporation. How would a grant of head of state immunity impact First American Corporation?
2. Please describe the reasons why you believe Sheikh Zayed, et al., should not be granted head of state immunity related to their role in the BCCI scandal.
3. Would a grant of head of state immunity set a bad precedent as far as protecting the safety and soundness of our banking system?

The hearing is scheduled to begin at 10:00 a.m. in Room 2128, Rayburn House Office Building. In accordance with Committee rules, please deliver 200 copies of your prepared statement by 10:00 a.m., December 8, 1993. Your entire written statement will be included in the hearing record and will be made available to all Committee members in advance of your appearance.

Thank you for your cooperation. The Committee looks forward  
to your testimony.

Sincerely,



A handwritten signature in black ink, appearing to read "Henry B. Gonzalez".

Henry B. Gonzalez

Chairman

HBG:dk/jr

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 WASHINGTON, DC 20515-6050

December 1, 1993

Mr. Joseph Dellapenna  
 Professor of Law  
 Villanova University School of Law  
 Villanova, PA 19085

Dear Professor Dellapenna:

The Committee on Banking, Finance and Urban Affairs will hold a hearing on Thursday, December 9, 1993, on the State Department's consideration of a request for head of state immunity by Sheikh Zayed Bin Sultan al-Nahayan, et al, related to their role in the Bank of Credit and Commerce International (BCCI) scandal. I respectfully request that you testify at the hearing.

Sheikh Zayed was BCCI's principal shareholder. There is currently a civil complaint against Sheikh Zayed, et al in U.S. District Court for their alleged role in BCCI's secret ownership of First American Bank. Sheik Zayed, et al also face potential criminal action from Federal prosecutors and the District Attorney's Office for the County of New York.

The Committee would like to better understand the issues related to the requests for head of state immunity. Accordingly, please address the following questions in your written testimony:

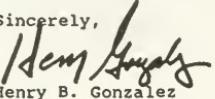
1. Please define head of state immunity and provide a brief history of its use.
2. Are there any precedents for extending head of state immunity to conduct in government-regulated commercial enterprises such as banking?
3. In your opinion, if the Emir's request is granted, how would commerce between foreign governments and U.S.-regulated entities be affected?

Please also provide any additional comments you have related to the Emir's request for head of state immunity.

The hearing is scheduled to begin at 10:00 a.m. in Room 2128, Rayburn House Office Building. In accordance with Committee rules, please deliver a copy of your prepared statement by 10:00 a.m., December 8, 1993. Your entire written statement will be included in the hearing record and will be made available to all Committee members in advance of your appearance.

Thank you for your cooperation. The Committee looks forward to your testimony.

Sincerely,



Henry B. Gonzalez  
Chairman

HBG:jr/dk

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 ROD GRAHS, NEW YORK, 10725  
 ERIC SCHWARTZ, ALABAMA  
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ONE HUNDRED THIRD CONGRESS

2129 RAYBURN HOUSE OFFICE BUILDING  
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December 7, 1993

Mr. Benjamin O. Tayloe, Esq.  
 Counsel for the Emir of Abu Dhabi  
 Patton, Boggs & Blow  
 2550 M Street, N.W.  
 Washington, D.C. 20037

Dear Mr. Tayloe:

The Committee on Banking, Finance and Urban Affairs will hold a hearing on Thursday, December 9, 1993, to discuss the State Department's consideration of a request for head of state immunity by Sheikh Zayed Bin Sultan Al-Nahyan, et al., related to the Bank of Credit and Commerce International scandal. I respectfully request that you testify at the hearing.

The Committee would like to better understand the issues related to the request for head of state immunity by the Emir, et al. Accordingly, please address the following questions in your written testimony.

1. Please explain the basis for the request for head of state immunity.
2. Would a grant of head of state immunity set a bad precedent as far as protecting the safety and soundness of our banking system?

The hearing is scheduled to begin at 10:00 a.m. in Room 2128, Rayburn House Office Building. In accordance with Committee rules, please deliver 200 copies of your prepared statement by 10:00 a.m., December 8, 1993. Your entire written statement will be included in the hearing record and will be made available to all Committee members in advance of your appearance.

Thank you for your cooperation. The Committee looks forward to your testimony.

Sincerely,  
*Henry Gonzalez*  
 Henry B. Gonzalez  
 Chairman

HBG:dk/jr

JOHN F. LEWIS, NEW YORK  
 BRUCE F. VENTO, MINNESOTA  
 CHARLES E. SCHWAB, NEW YORK  
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 ERVIN D. STERN, NEW YORK  
 MARSH WATERS, CALIFORNIA  
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 CAROLYN B. MALONEY, NEW YORK  
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 ELIZABETH FURRL, OREGON  
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November 22, 1993

DOUG FRUITL, NEBRASKA  
 THOMAS RODG, PENNSYLVANIA  
 TODD ROTH, WISCONSIN  
 ALICE S. WAGNER, CONNECTICUT  
 RICHARD H. BAXTER, LOUISIANA  
 JIM HUSTLE, KANSAS  
 CRAIG JOHNSON, COLORADO  
 SAM JOHNSON, TEXAS  
 DIBBLE PRUITT, OHIO  
 JOHN LAMONT, CONNECTICUT  
 JOE POKORNÝ, WISCONSIN  
 BOB REED, MASSACHUSETTS  
 ROD CRAMER, MINNESOTA  
 SPENCER BACHUS, ALABAMA  
 MARK BROWN, SOUTH CAROLINA  
 MICHAEL CASTLE, DELAWARE  
 PETER KING, NEW YORK  
 BLANKARD SANDERS, VERMONT  
 (702) 225-4147

Honorable Warren M. Christopher  
 Secretary of State  
 Washington, D.C. 20520

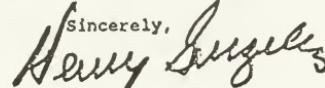
Dear Secretary Christopher:

I understand that the Department of State is currently considering a grant of sovereign immunity for the Emir of Abu Dhabi. I believe it would be a mockery of our U.S. banking statutes and a terrible precedent to allow a grant of immunity to the Emir given his role in the scandal involving the Bank of Credit and Commerce International's (BCCI's) secret ownership of First American Bank.

I have long championed efforts to ensure greater oversight of foreign involvement in the U.S. financial system, especially participation by foreign government-backed entities. The recent BCCI and BNL scandals, which I helped bring to light, serve as a painful example of how vulnerable our financial system is to abuse by foreign governments.

To allow a foreign person, even a head of state, a grant of immunity from civil or criminal actions related to abuse of our financial system would send exactly to wrong signal to other miscreants wishing to engage in similar activities. While I understand that there may be diplomatic arguments to the contrary, ensuring that foreigners are held accountable for abusing our financial system should be our top priority. Accordingly, I adamantly oppose the granting of sovereign immunity to the Emir of Abu Dhabi.

Thank you for your consideration. I look forward to your thoughts on this important issue.

Sincerely,  
  
 Henry B. Gonzalez  
 Chairman

HBG:dk

HENRY B. GONZALEZ, TEXAS, CHAIRMAN  
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ONE HUNDRED THIRD CONGRESS  
 2129 RAYBURN HOUSE OFFICE BUILDING  
 WASHINGTON, DC 20515-6050

December 9, 1993

Honorable Judge Joyce Hens Green  
 United States District Court for  
 the District of Columbia  
 Room 6327  
 3rd and Constitution Avenues, N.W.  
 Washington, D.C. 20001

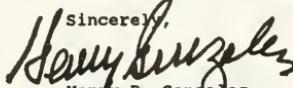
Dear Judge Green:

I understand that you are currently considering a grant of head of state immunity for the Emir of Abu Dhabi and several related parties related to First American Corporation, et al v. Sheikh Zayed Bin Sultan Al Nahyan, et al. I believe it would be a terrible precedent to grant immunity to a head of state that voluntarily subjected himself to the laws and regulations of the United States.

I have long championed efforts to ensure greater oversight of foreign involvement in the U.S. financial system, especially participation by foreign government-backed entities. The recent BCCI and BNL scandals, which I helped bring to light, serve as painful examples of how vulnerable our financial system is to abuse by foreign governments.

To allow a head of state a grant of immunity from potential civil or criminal actions related to abuse of our financial system would send exactly the wrong signal to other heads of state wishing to engage in similar activities. Accordingly, I oppose the granting of head of state immunity to the Emir of Abu Dhabi, et al.

Thank you for your consideration. With best wishes.

Sincerely,  
  
 Henry B. Gonzalez  
 Chairman

HBG:dk

JOHN KERRY  
MASSACHUSETTS

United States Senate  
WASHINGTON, DC 20510

November 10, 1993

The Honorable  
Warren M. Christopher  
Secretary of State  
Washington DC 20520

Re: Question of Head of State Immunity for Abu Dhabi  
In Matters Pertaining to BCCI

Dear Mr. Secretary:

I today learned of the possibility that the Department of State may be considering whether the Emir of Abu Dhabi and his family are entitled to be accorded head of state immunity in connection with matters pertaining to the BCCI affair, as requested by Abu Dhabi's Washington representatives at the law firm of Patton, Boggs, & Blow.

Having spent some considerable time investigating matters pertaining to BCCI's extensive web of criminal activity, including its illegal purchase of U.S. banks, I would like to express my strong opposition to the recommendation of head of state immunity for any person or entity who participated in BCCI's actions in the United States.

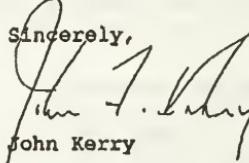
There are strong policy reasons in general for the United States not granting head of state immunity to anyone for activities that are commercial in nature, and that pertain to regulated industries in the United States. No foreign head of state should be in the position to have the Department of State assist him in escaping civil or criminal responsibility for violations of our law in commercial matters taking place in our own country. The alternative would expose American citizens to predation and fraud by anyone who happens to be a head of state. The Department of State is an agency of the government of the United States. Its function is to protect American citizens, not to give immunity to people who defraud American citizens and break American laws.

BCCI has been justifiably described as the biggest banking scandal in history. The scope of wrongdoing on the part of BCCI and most if not all of its shareholders, was enormous, resulting in the loss of billions of dollars and injury to millions of shareholders. Several U.S. banks were damaged by BCCI's activities, and one, the Independence Bank in Encino, California, failed as a result of BCCI's purchase, at a substantial cost to the FDIC.

Any recommendation that head of state immunity be granted in this case would send precisely the wrong message by the Department of State concerning the views of the United States government about this kind of activity. Given the notoriety of the BCCI case, such a decision could also subject the Department of State to substantial criticism domestically and abroad.

I would appreciate being kept apprised of any decision the Department of State may make on the request for immunity by the Emir of Abu Dhabi and his family, and of being provided any legal analysis produced by the Office of the Legal Advisor in regards to this matter.

Sincerely,

  
John T. Kerry  
John Kerry

HENRY B. GONZALEZ, TEXAS, CHAIRMAN  
 STEPHEN L. WILSON, NORTH CAROLINA  
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ONE HUNDRED THIRD CONGRESS

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(202) 226-4247

FOR IMMEDIATE RELEASE

**WASHINGTON, D.C.** December 9, 1993 -- Chairman Henry Gonzalez of the Committee on Banking, Finance and Urban Affairs, today reproached the Departments of Justice and State for backing out at the last minute on a hearing on whether to grant Sheik Zayed bin Sultan Al-Nahyan, the monarch of Abu Dhabi, head of state immunity for his role in the Bank of Credit and Commerce International (BCCI) scandal.

The hearing is on the issue of whether the State Department should grant the Sheik's request for immunity from civil and criminal lawsuits filed in the U.S. At issue is who gets the hundreds of millions in proceeds from the recent sale of First American Bank to First Union Corporation of Charlotte, N.C. The Sheik believes the money is his as he says he was a victim of the fraud perpetrated at BCCI. However, First American's trustees said the Sheik knew about and even participated in the BCCI fraud and therefore the funds should go to the trustees.

In letters to the State Department and Justice Department, Chairman Gonzalez said he was "disappointed in their reluctance to take a public stand on this issue. Given the lack of laws governing head of state immunity, the Committee is left with no alternative that would prohibit heads of state and their nominees, from participating in the U.S. banking system without waiving immunity rights."

"The hearing offered the State Department an opportunity to educate the Congress and the public about the process employed by the executive branch to make head of state immunity decisions," Mr. Gonzalez said. "There is no valid reason for not taking advantage of this opportunity. In addition, by failing to take a leadership role in condemning sovereign abuse of our financial system, the State Department has abstained from condemning future abuses of our financial system," Chairman Gonzalez said.

The outcome of the case has a direct effect on U.S. taxpayers. Because of a plea agreement between the liquidators of BCCI and the U.S. Government, half of any money left over from the sale of First American will go to the U.S. Treasury. The other half will go to depositors who had money in BCCI Branches Abroad. (The Washington Post, June 25, 1993.)

# # #

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**COMMITTEE ON BANKING, FINANCE AND URBAN AFFAIRS**

ONE HUNDRED THIRD CONGRESS  
 2129 RAYBURN HOUSE OFFICE BUILDING  
 WASHINGTON, DC 20515-6050

December 8, 1993

Honorable Janet Reno  
 Attorney General of the U.S.  
 Washington, D.C. 20530

Dear Madam Attorney General:

I am disappointed by the Justice Department's decision to withdraw from testifying before the Banking Committee related to Sheikh Zayed Bin Sultan Nahyan's request for head of state immunity related to his involvement in the Bank of Credit and Commerce International (BCCI) scandal.

The hearing offered the Justice Department an opportunity to educate the Congress and the public about the process employed by the executive branch to make head of state immunity decisions. There is no valid reason for not taking advantage of this opportunity. In addition, by failing to take a leadership role in condemning sovereign abuse of our financial system, the Justice Department has abstained from condemning future abuses of our financial system.

Given the lack of laws governing head of state immunity, and the Justice Department's lack of leadership on this issue, the Committee is left with no alternative but to consider a legislative alternative that would prohibit heads of state, and their nominees, from participating in the U.S. banking system without waiving immunity rights.

Sincerely,  
*Henry B. Gonzalez*

Henry B. Gonzalez  
 Chairman

HBG:dk

HENRY B. GONZALEZ, "SAB'S CHAIRMAN  
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(ODD 275-224)

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ONE HUNDRED THIRD CONGRESS  
 2129 RAYBURG HOUSE OFFICE BUILDING  
 WASHINGTON, DC 20515-6050

December 8, 1993

The Honorable Warren Christopher  
 Secretary of State  
 2201 C Street, N.W.  
 Washington, D.C. 20520

Dear Secretary Christopher:

I am disappointed by the State Department's decision to withdraw from testifying before the Banking Committee related to Sheikh Zayed Bin Sultan Nahyan's request for head of state immunity related to his involvement in the Bank of Credit and Commerce International (BCCI) scandal.

The hearing offered the State Department an opportunity to educate the Congress and the public about the process employed by the executive branch to make head of state immunity decisions. There is no valid reason for not taking advantage of this opportunity. In addition, by failing to take a leadership role in condemning sovereign abuse of our financial system, the State Department has abstained from condemning future abuses of our financial system.

Given the lack of laws governing head of state immunity, and the State Department's reluctance to take a public stand on this issue, the Committee is left with no alternative but to consider a legislative alternative that would prohibit heads of state, and their nominees, from participating in the U.S. banking system without waiving immunity rights.

Sincerely,

*Henry Gonzalez*  
 Henry B. Gonzalez  
 Chairman

HBG:dk



## U. S. Department of Justice

## Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 7, 1993  
Via Facsimile and  
Messenger

Honorable Henry B. Gonzalez  
Chairman  
Committee on Banking, Finance and  
Urban Affairs  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

I have tried several times since yesterday to contact you about your letter, dated November 30, 1993, inviting the Attorney General or her designee to testify at a hearing on December 9, 1993. According to the invitation, the hearing will pertain to the State Department's consideration of a request for head of state immunity by Sheikh Zayed Bin Sultan Al-Nahyan, et al., related to their role in the Bank of Credit and Commerce International (BCCI) scandal. We are advised that the Department of State also has been invited to send a witness to this hearing.

We regret that the Administration will be unable to testify at this time due to pending civil litigation and other investigations relating to BCCI. As we have advised your staff, the Department of State has been asked to express a view about the applicability of the head of state doctrine in connection with First American Corp., et al. v. Sheikh Zahed Bin Sultan Al-Nahyan, et al. (D.C.D.C.) and on November 29, 1993, we filed a Statement of Interest with the Court (copy enclosed). Hence, the issues that would be presented at this hearing are under review but our position will not be finalized in time to present testimony. Additionally, we are seriously concerned that testimony at this time would adversely impact pending negotiations regarding other BCCI related matters. Under these circumstances, we hope that you will consider postponing the hearing until a later time when these concerns are resolved. In the meantime, as we have advised Committee staff, we would be pleased to brief you about this matter at any time at your convenience.

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10 U.S. 1993

Committee on Banking, Finance  
& Urban Affairs

We appreciate your consideration of our position in this matter. Please do not hesitate to contact me if we can provide other assistance.

Sincerely,

*Sheila Anthony*  
Sheila F. Anthony  
Assistant Attorney General

Enclosure

cc: Honorable James A. Leach  
Ranking Minority Member

RECEIVED

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA ~~NOV 29~~ 4 18 PM '93

FIRST AMERICAN CORPORATION,	)	UNITED STATES
et al.,	)	DISTRICT COURT
Plaintiffs,	)	DISTRICT OF COLUMBIA
v.	)	C.A. No. 93-CV-1309 (JHG)
SHEIKH ZAYED BIN SULTAN AL-NAYHAN,	)	Hon. Joyce Hens Green
et al.,	)	
Defendants.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

The United States files this Statement Of Interest, pursuant to 28 U.S.C. § 517,<sup>1</sup> to inform the Court that the United States has been requested by certain of the parties in this case to express a view to the Court concerning the applicability of the head of state immunity doctrine in this proceeding. The United States is presently examining this request, a process requiring coordination among several federal agencies because of the complex procedural posture of this case and its relationship to other proceedings. In this connection, parties supporting and opposing this request have indicated that they wish to have an additional opportunity to present their views to the United States prior to a final decision. Given the potential importance of the issue of head of state immunity to the instant proceeding, and in the hope of facilitating ultimate resolution, the United States wishes to accommodate the parties in this matter.

---

<sup>1</sup> 28 U.S.C. § 517 provides that any officer of the Department of Justice "may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

In light of these considerations, the United States respectfully requests that the Court defer its consideration of the head of state immunity issues pending completion of the United States' review. The United States notes that, in addition to the issues relating to head of state immunity, certain other potentially dispositive issues have been raised in the motions to dismiss. In the particular circumstances of this case, the Court may wish to consider those other matters to the extent possible prior to addressing the head of state immunity issues.

Respectfully submitted,

FRANK W. HUNTER  
Assistant Attorney General

ERIC H. HOLDER JR.  
United States Attorney

Vincent M. Garvey /THP  
VINCENT M. GARVEY

X61. A.  
THOMAS H. PEEBLES

Attorneys, Department of Justice  
Civil Division  
Federal Programs Branch  
901 E Street, N.W., Suite 1000  
Washington, D.C. 20530  
Telephone: (202) 514-4778

November 29, 1993

CERTIFICATE OF SERVICE

I, Thomas H. Peebles, hereby certify that on November 29, 1993, I served a copy of the foregoing Statement Of Interest Of The United States, by first-class mail, postage prepaid, to the following:

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Jean V. MacHarg  
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Stock Holding Company  
c/o Estate of Sheikh Rashid bin Said al-Maktoum  
Za'beel Palace  
Dubai, United Arab Emirates

Sheikh Mohammed bin Rashid al-Maktoum  
Za'beel Palace  
Dubai, United Arab Emirates

Crescent Holding Company  
c/o Sheikh Mohammed bin Rashid al-Maktoum  
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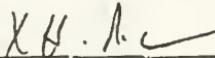
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Zafar Iqbal Chaudhri  
c/o UAE Federal Prosecutor  
Ministry of Justice  
Post Office Box 753  
Abu Dhabi, United Arab Emirates

  
\_\_\_\_\_  
Thomas H. Peebles

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DK

United States Department of State

Washington, D.C. 20520

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Banking, Finance &amp; Urban Affairs Committee

Dear Mr. Chairman:

The Secretary has asked me to reply to your letter of November 22, 1993, concerning the issue of head of state immunity for Sheikh Zayed, the President of the United Arab Emirates. This issue has been raised by Sheikh Zayed and several other defendants in a lawsuit brought against them by First American Corporation and First American Bankshares, Inc. in the District of Columbia.

The Department of State fully appreciates the variety of legal and policy interests potentially implicated in this case. For that reason, among others, the Department has been coordinating its review of this matter very closely with the Department of Justice and other interested agencies, and is affording the parties a full opportunity to present their views to us. We will continue to do so.

In this connection, I would like to bring to your attention the Statement of Interest recently filed in this case by the Department of Justice. It informs the Court that the United States has been requested by certain of the parties to express a view to the Court concerning the applicability of the head of state immunity doctrine in the proceeding, and that the United States is presently examining that request. In view of the need to coordinate within the Government before responding to this request, and the desire to accommodate the parties' request for further consultations, the Statement of Interest requests the Court to defer its consideration of the head of state immunity issues pending completion of the United States' review. It also suggests that the Court may wish to consider other issues in the interim, some of which could be dispositive to the proceedings.

The Honorable  
Henry B. Gonzalez, Chairman,  
Committee on Banking, Finance and Urban Affairs,  
House of Representatives.

-2-

I hope this information will be helpful to you and the members of the Committee. A copy of our Statement of Interest is enclosed for your information. Please do not hesitate to contact us again should you need further assistance.

Sincerely,

*Wendy R. Sherman*

Wendy R. Sherman  
Assistant Secretary  
Legislative Affairs

Enclosure: As stated

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

FIRST AMERICAN CORPORATION, )  
et al., Plaintiffs, )  
v. )  
SHEIKH ZAYED BIN SULTAN AL-NAYHAN, )  
et al., )  
Defendants. )

C.A. No. 93-CV-1309 (JHG)  
Hon. Joyce Hens Green

STATEMENT OF INTEREST OF THE UNITED STATES

The United States files this Statement Of Interest, pursuant to 28 U.S.C. § 517,<sup>1</sup> to inform the Court that the United States has been requested by certain of the parties in this case to express a view to the Court concerning the applicability of the head of state immunity doctrine in this proceeding. The United States is presently examining this request, a process requiring coordination among several federal agencies because of the complex procedural posture of this case and its relationship to other proceedings. In this connection, parties supporting and opposing this request have indicated that they wish to have an additional opportunity to present their views to the United States prior to a final decision. Given the potential importance of the issue of head of state immunity to the instant proceeding, and in the hope of facilitating ultimate resolution, the United States wishes to accommodate the parties in this matter.

<sup>1</sup> 28 U.S.C. § 517 provides that any officer of the Department of Justice "may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

In light of these considerations, the United States respectfully requests that the Court defer its consideration of the head of state immunity issues pending completion of the United States' review. The United States notes that, in addition to the issues relating to head of state immunity, certain other potentially dispositive issues have been raised in the motions to dismiss. In the particular circumstances of this case, the Court may wish to consider those other matters to the extent possible prior to addressing the head of state immunity issues.

Respectfully submitted,

FRANK W. HUNGER  
Assistant Attorney General

ERIC H. HOLDER JR.  
United States Attorney

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VINCENT M. GARVEY

X W. A.  
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Telephone: (202) 514-4778

November 29, 1993

CERTIFICATE OF SERVICE

I, Thomas H. Peebles, hereby certify that on November 29, 1993, I served a copy of the foregoing Statement Of Interest Of The United States, by first-class mail, postage prepaid, to the following:

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Za'beel Palace  
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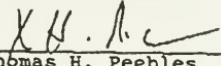
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Zafar Iqbal Chaudhri  
c/o UAE Federal Prosecutor  
Ministry of Justice  
Post Office Box 753  
Abu Dhabi, United Arab Emirates

  
Thomas H. Peebles

WALL STREET JOURNAL, December 8, 1993

## Sovereign Impunity

The State Department says it's cracking down on diplomats who refuse to pay traffic tickets. So it sure seems strange that State should even think about granting immunity to a man linked to the biggest bank heist in history.

Yet "sovereign immunity" is exactly what the lawyers for Sheik Zayed bin Sultan al-Nahyan, the monarch of Abu Dhabi, are asking from the Clinton Administration. Remember the Bank of Credit & Commerce International, or BCCI? That's the corrupt banking empire that bilked depositors around the globe of billions of dollars, yet its full story remains a mystery. The Sheik is being sued in an American court for \$1.5 billion for actions related to BCCI—a suit that an immunity grant would wipe out. In the annals of diplomacy, the Sheik's request may retire the prize for chutzpah.

This legal ploy might also be laughed out of town, save for the clout of his lawyers. Sheik Zayed is represented by Patton, Boggs & Blow, the former firm of Washington influence broker and now Commerce Secretary Ron Brown. According to a survey of filings made under the Foreign Agent Registration Act, the Sheik pays the firm well for its influence: From March 1991 to June 1993, Patton, Boggs received \$11.7 million from the Abu Dhabi government or the Abu Dhabi Investment Authority. In a similar, roughly two-year period, Abu Dhabi also paid more than \$3 million to Robinson, Lake, Lerer & Montgomery for public relations. Despite these fees for image-help, both firms have kept quiet about the Sheik's sovereign-immunity request.

This lack of attention will change this week, however, when House Banking Chairman Henry Gonzalez holds a hearing on the matter. He's responding to a request by Harry Albright, the Trustee for First American, a U.S. bank that turned out to have been a secret BCCI subsidiary. In a letter to Mr. Albright, Chairman Gonzalez said, "It would be a terrible precedent to allow a grant of immu-

nity to a person engaged in nefarious banking activities in the United States."

Sovereign immunity is of course a well-known legal principle, but it has traditionally been reserved for acts of state, not of private commerce. The lawyers we've asked say State has never granted the absolute immunity in U.S. courts—for both civil and criminal matters—that the Sheik now wants. Especially since the Sheik himself is suing in a U.S. court to collect some \$280 million from First American bank. Sheik Zayed wants to use American law when it serves his interests but be immune from it when someone has a claim on him.

The Sheik's hired guns have been arguing in response to anyone who raises questions about his role that he is just another "victim" of BCCI. Yet his case would be more credible if his agents hadn't packed a plane full of critical files from BCCI's London office in 1990 and brought them to Abu Dhabi, where they remain inaccessible to U.S. investigators. A year later, after BCCI was seized, key BCCI officials were taken to Abu Dhabi and have been held since under government "house arrest" between Abu Dhabi's trial proceedings. This means they can't testify in American courts. And now Sheik Zayed asks his lawyers to influence the Clinton Administration to do a diplomatic end run around U.S. law. Is this the way most "victims" behave?

The broader point here goes beyond the Sheik to the integrity of the U.S. financial system. Despite the magnitude of BCCI's theft, we still know little about it. Nor do we know how it came to secretly own First American, one of the largest banks in the nation's capital, a bank run by Beltway power brokers Clark Clifford and Robert Altman. With Justice and the Federal Reserve seemingly uninterested, Mr. Albright's civil suit is the best way to find out what really happened. Perhaps the Gonzalez hearing could explore not just sovereign immunity, but whether the U.S. should instead be demanding extradition.

WALL STREET JOURNAL, January 7, 1994

# Sheik to Seek BCCI Damages By Abu Dhabi

By PETER TRUELL

*Staff Reporter of THE WALL STREET JOURNAL*

Sheik Khalid bin Mahfouz, a prominent Saudi Arabian financier, will file suit today against the Abu Dhabi government in London's high court, according to people familiar with the documents.

The suit seeks billions of dollars in damages, while alleging the Arab sheikdom has conspired to enmesh Sheik Khalid in the affairs of the scandal-plagued, and now defunct, Bank of Credit & Commerce International.

The legal action would further sour the already-tense relationship between Saudi Arabia and the neighboring sheikdom of Abu Dhabi. Abu Dhabi is ruled by Sheik Zayed al-Nahyan, whose government controlled a majority stake in BCCI Holdings (Luxembourg) SA, BCCI's parent company. Regulators from Britain, the U.S. and several other countries seized and closed BCCI, a big international bank, in July 1991, citing a history of fraud, money laundering and arms trafficking.

In his suit, Sheik Khalid is expected to allege that the Abu Dhabi Investment Authority, an agency that manages much of that Persian Gulf country's oil wealth, and its senior officer, Ghaneim al-Mazrui, conspired to embroil him in the affairs of BCCI using deception and fraud.

In the late 1980s, Sheik Khalid sat on BCCI's board after his family, which runs National Commercial Bank of Jiddah, Saudi Arabia's largest bank, bought a substantial stake in BCCI. The family sold that stake back to BCCI prior to the seizure and closure of the Luxembourg-based bank.

Lawyers for Sheik Zayed and the Abu Dhabi government in Washington and London didn't return telephone calls seeking comment. In the past, spokesmen for

Sheik Zayed and the Abu Dhabi government have maintained that he and his government are themselves victims of the BCCI scandal who lost billions of dollars of deposits and investments and are innocent of any wrongdoing.

Abu Dhabi is desperately trying to find ways of settling the BCCI affair, which has increasingly haunted the sheikdom the past three years, threatening to discredit its ruling hierarchy and exploding into a world-wide sprawl of legal claims.

A Luxembourg court last fall shot down a proposed liquidators' settlement for dealing with depositors who lost as much as \$10 billion in the closure of BCCI. A powerful group of BCCI depositors this week demanded that Abu Dhabi pay as much as 50 cents for each dollar of deposits lost in the closure and that it make the payment within three months.

The London suit is expected to try to force Abu Dhabi to indemnify Sheik Khalid for any losses he may incur as a result of a 1992 BCCI liquidators' suit against him. That suit alone seeks as much as \$10.5 billion from Sheik Khalid.

Recent legal developments in the U.S. have given Sheik Khalid more freedom to take legal action. The Manhattan district attorney, Robert Morgenthau, and the Federal Reserve Board in December settled bank-fraud charges against the Saudi sheik. As part of the settlement, Sheik Khalid paid \$37 million to the authorities and agreed to set up a \$188 million settlement fund at the Federal Reserve Bank of New York that will be available to satisfy settlements or judgments relating to pending claims against the sheik and his bank.

In exchange, the authorities dropped charges that Sheik Khalid conspired to steal more than \$300 million from BCCI depositors.

Commenting on the settlement, Lawrence Tribe, a Harvard University law professor who represents Sheik Khalid, said: "Abu Dhabi conspired to lure him and many others" into the BCCI affair. Abu Dhabi has tried "to shift responsibility to make it appear as though he was responsible for things that Abu Dhabi officials were responsible for."

WALL STREET JOURNAL, January 11, 1994, Page A2

## |BCCI Accord May Spur More Legal Actions

By PETER TRUELL

*Staff Reporter of THE WALL STREET JOURNAL*

The weekend agreement reached between the U.S. and Abu Dhabi over claims relating to the now-defunct Bank of Credit & Commerce International and its former subsidiary, First American Bank of Washington, D.C., probably will spur further legal actions in the U.S.

The new agreement provides U.S. prosecutors with more information and access to key witnesses. The settlement was struck Saturday by the U.S. Justice Department, the New York County district attorney's office and the Federal Reserve Board, and Abu Dhabi.

The accord also could lead to a settlement of depositors' claims, which are estimated to total as much as \$12 billion. A key clause requires the Persian Gulf sheikdom, which owned 77% of BCCI, to settle with BCCI's liquidators on depositors' claims by April 1 or hand over "all of the original books and records of BCCL." Handing over all records might well open the doors to years of lawsuits.

The liquidators of BCCI Holdings (Luxembourg) SA, the bank's holding company, were appointed by a Luxembourg court after the bank was closed by regulators in the U.S. and Europe on July 5, 1991, citing a history of fraud going back many years.

With the settlement, civil racketeering charges against Abu Dhabi leader Sheikh Zayed al-Nahyan and other Abu Dhabi officials were dropped. Those charges alleged that the officials harmed First American by benefiting from BCCI's covert and thus illegal ownership of the U.S. bank. Other parts of that suit, filed last year in federal court in Washington, D.C., will continue, however. And First American's court-appointed trustee, Harry Albright, will receive \$50 million to pursue that legal action.

The biggest plum from the agreement is that Abu Dhabi now must hand over Sualib Naqvi, a former BCCI chief executive officer, to the U.S. authorities within the next several weeks, and to provide access to several other senior BCCI officers now in custody in the emirate. U.S. investigators maintain that Mr. Naqvi holds the key to understanding many of BCCI's complex and illegal dealings.

Mr. Naqvi's testimony and documents also are likely to be relevant to several other outstanding BCCI-related issues, and particularly any further action against Clark Clifford and Robert Altman, the former top officers of First American who also served as U.S. lawyers for BCCI, as well as counsel to First American.

The Justice Department probably will first make a decision whether this new evidence provides grounds for a federal case against Messrs. Clifford and Altman, according to a person close to the matter. If not, that evidence will probably be passed on to the Federal Reserve Board, which has a pending action against the two men before an administrative law judge in Washington, D.C.

In August, Mr. Altman was acquitted of charges related to BCCI's takeover of First American. The Manhattan District Attorney's office later dropped similar charges against Mr. Clifford, citing his poor health. Messrs. Clifford and Altman, who have consistently maintained their innocence, also remain defendants in the First American trustee's civil racketeering suit. The trustee last year oversaw the sale of most of First American's assets to First Union Corp. of Charlotte, N.C.

Mr. Naqvi's testimony and documents also are likely to shed some light on others involved in the BCCI scandal who remain a target for U.S. authorities. These include Agha Hasan Abedi, BCCI's ailing founder, who was the subject of a writ issued in Abu Dhabi in recent days. He still is wanted by the U.S. authorities, as is Ghaith Pharaon, a one-time investor in, and front man for the rogue bank.

In return for a promise that U.S. prosecutors wouldn't initiate legal proceedings against Abu Dhabi officials, the emirate waived its right to \$400 million of U.S. claims, and much of this money will be used to help to compensate depositors.

THE WASHINGTON POST, December 9, 1993, Page B14

# BCCI Suit Becomes a Diplomatic Battle

*Rep. Gonzalez Disputes Abu Dhabi Ruler's Immunity Claim in Case*

By Sharon Walsh  
Washington Post Staff Writer

A legal and diplomatic battle is gathering force over whether a U.S. court should let a lawsuit in the BCCI case go forward against the ruler of oil-rich Abu Dhabi, who claims he deserves immunity on grounds he is a head of state.

Yesterday the issue sparked a confrontation between Congress and the administration, as State and Justice Department officials refused at the last minute to attend a hearing on the subject called for today by House Banking Committee Chairman Henry B. Gonzalez (D-Tex.).

Abu Dhabi's Sheikh Zayed bin Sultan al-Nahyan, who also is president of the United Arab Emirates, has asked the State Department to rule that he has head-of-state immunity from a lawsuit brought against him by the trustee of First American Bankshares Inc. The \$1.5 billion civil action alleges that Zayed, who was the majority shareholder of the Bank of Credit and Commerce International, played an active role in BCCI's illegal takeover of First American.

On one hand, the United States doesn't wish to offend Zayed, leader of a pro-American Persian Gulf state and a U.S. ally in the war against Iraq. On the other hand, Zayed owned 77 percent of BCCI, the international bank shut by regulators in 1991 amid worldwide charges of fraud and money-laundering.

The suit against Zayed is "an affront to a foreign sovereign and . . . any effort at redress for alleged wrongs should occur through bilateral discussions between the United States and the United Arab Emirates," said Zayed's lawyers in a filing with the State Department and U.S. District Court in the District.

Harry W. Albright Jr., the court-appointed trustee of First American, said in a letter to Attorney General Janet Reno that granting immunity to Zayed would be "monstrous." It would "give to the public the regrettable message that a man, if he is rich enough and has enough oil, can . . . create a fraudulent bank."

Gonzalez called the congressional hearings after writing Secretary of State Warren Christopher that giving Zayed immunity "would be a mockery of our U.S. banking statutes and a terrible precedent . . . Ensuring that foreigners are held accountable for abusing our financial system should be our top priority."

Justice spokesman Carl Stern said the department declined to appear at the hearing because "it's not a good time to hold a public hearing . . . We're concerned the hearing will have an adverse impact on other pending negotiations concerning BCCI."

Justice asked Gonzalez to postpone the hearing, which he refused to do, and offered to brief him on the matter, Stern said. A State Department official declined to comment on the decision not to attend the hearing.

Gonzalez said he was "disappointed" in the departments' "reluctance to take a public stand on this issue."

First American's branches and assets have been sold to First Union Corp. of Charlotte, N.C. But the bank's board of directors is carrying out the legal case, and the outcome will directly affect U.S. taxpayers.

Because of a plea agreement between BCCI's liquidators and the U.S. government, half of any money left over from the sale of First American will go to the U.S. Treasury. The other half will go to depositors who had money in BCCI branches abroad.

Zayed's representatives have said he is a victim, not the perpetrator, of the BCCI fraud, having lost billions in deposits when the bank was closed. In addition, Zayed is owed \$220 million he lent to First American; he wants his money repaid out of the \$453 million that First Union Corp. paid for First American.

First American's lawyers at Jones, Day, Reavis & Pogue have argued that Zayed is not entitled to sovereign immunity because this is a commercial case in which Zayed was acting not as head of state, but as an interested investor. Attorneys for Zayed contend that "absolute immunity for sitting heads of state . . . is the universal rule" recognized by American courts.

THE WASHINGTON POST, January 9, 1994, Page A3

# U.S. Strikes Deal in BCCI Case

*Pact Frees Up \$400 Million, Gives Prosecutors Access to Key Witness*

By Sharon Walsh  
Washington Post Staff Writer

U.S. prosecutors and banking officials settled a legal and diplomatic battle with Abu Dhabi yesterday when the royal family of the Persian Gulf state agreed to give up claims to \$400 million that it had invested in First American Bankshares Inc.

The agreement also gives investigators access to a key witness with knowledge of the BCCI financial scandal, sources familiar with the agreement said.

In return, a \$1.5 billion civil lawsuit against Abu Dhabi's ruler, brought by the court-appointed trustee for Washington-based First American, will be dropped, the sources said.

U.S. prosecutors also have agreed not to pursue any criminal charges against the ruler, Sheikh Zayed bin Sultan al-Nahyan, who was the majority shareholder in the now-defunct Bank of Credit and Commerce International.

With the dropping of Abu Dhabi's claims on the \$400 million, about half will go to the U.S. Treasury and the other half to depositors of BCCI around the world who lost money when the scandal-ridden bank was shut down in 1991.

The deal provides for U.S. investigators to speak for the first time with Sualib Naqvi, the chief deputy to BCCI founder Aga Hasan Abedi. He is under indictment in the United States on bank fraud charges but has never been interviewed by prosecutors because he and other key BCCI officials are under house arrest in Abu Dhabi.

The settlement, signed by the parties yesterday after four days of secret meetings in Geneva, also will give U.S. officials access to thousands of BCCI documents that were flown out of London to Abu Dhabi by Naqvi just before the bank was closed by regulators for widespread fraud.

"This is a remarkable agreement in terms of what we've succeeded in getting," deputy attorney general Philip B. Heymann said last night. He praised "the breadth of questions resolved, the money to the U.S. and the level of cooperation among the Justice Department, the New York District Attorney's office and other agencies, both public and private."

New York District Attorney Robert M. Morgenthau and Justice Department officials have fought for more than three years for the chance to interview Naqvi and other witnesses in Abu Dhabi. They have said that one of the major roadblocks to their investigations was their inability to interview Naqvi, who ran BCCI alongside Abedi.

Abedi, who is in Pakistan, suffered a stroke several years ago and is unable to be interviewed. However, Naqvi may be able to tell investigators how BCCI came to illegally own four U.S. banks, including First American, and who knew about it in this country.

Zayed, one of the richest men in the world and ruler by decree of Abu Dhabi, leads the pro-Western United Arab Emirates, a federation of states on the Persian Gulf. In addition to his role as majority owner of BCCI, he owned 28 percent of the stock of First American, which was illegally owned by BCCI.

Zayed has claimed he was duped by Abedi and Naqvi, and that Zayed and his family were the biggest victims of BCCI's fraud. He had been unwilling to budge from this stance until recently, when his legal problems in the United States heated up.

That occurred in June, when the board of First American filed a civil racketeering suit seeking \$1.5 billion from the ruling family and other defendants, alleging for the first time that Zayed played an active role in BCCI's fraud.

Zayed's representatives went to the State Department, seeking diplomatic immunity from the suit for the ruler. But several members of Congress, including House Banking Committee Chairman Henry B. Gonzalez (D-Tex.) objected to immunity for Zayed.

Neither Zayed's attorneys at the Washington law firm of Patton, Boggs & Blow nor his public relations representatives at Robinson, Lake, Sawyer, Miller could be reached for comment late yesterday.

The \$400 million includes about \$235 million plus interest that Zayed had lent First American over several years when it was losing money because of news reports that it was owned by BCCI. Zayed also is giving up his 28 percent share of First American stock.

As part of the agreement between U.S. officials and Abu Dhabi, \$50 million of the funds that might have gone to Zayed will instead be used to help pay the severance of about 1,000 former First American employees who lost their jobs when the bank's branches and other assets were sold last year to First Union Corp. of Charlotte, N.C. First American still exists as a legal entity.

The money also will pay the costs to continue the civil suit brought by court-appointed trustee Harry W. Albright, Jr. against other defendants.

Those defendants include former First American officials Clark M. Clifford and Robert A. Altman.

In September, Altman was acquitted of criminal charges of bank fraud by a New York jury. Similar charges against former defense secretary Clifford were dropped because of his poor health.

The Justice Department has reserved its right to refile charges against Clifford and Altman. Federal charges were dropped so that the New York trial could take place first.

The settlement was hammered out among representatives from the Justice Department, the New York District Attorney's office, the Federal Reserve Board, First American and Abu Dhabi.

## EX-CHIEF OF B.C.C.I. TO BE EXTRADITED TO U.S. FOR TRIAL

AN ACCORD WITH ABU DHABI

New Access to Bank's Records  
Could Help Uncover Extent  
of Its Political Influence

By STEPHEN LABATON

*Special to The New York Times*

WASHINGTON, Jan. 9 — Reviving the stalled investigation of one of the largest global frauds in history, Federal prosecutors announced today that one of the two top executives of the Bank of Credit and Commerce International would be extradited to the United States to stand trial on criminal fraud charges.

As part of an agreement with the ruler of Abu Dhabi, who had been the largest shareholder of B.C.C.I., American investigators will also be given, for the first time, broad access to the bank's secret records and to 10 other former bank executives who had been inaccessible.

Prosecutors described the settlement between the United States and Abu Dhabi, a Persian Gulf emirate, as an enormous breakthrough that would open a new window on the bank scandal. In particular, the deal could bring investigators a big step closer to answering the troubling questions of how much influence B.C.C.I. wielded in American political and intelligence circles.

### Questions About U.S. Regulators

As much as \$20 billion that had been officially on the bank's books vanished in the summer of 1991 when bank regulators around the world shut down B.C.C.I.'s operations and accused it of fraud. Ultimately, more than \$12 billion is believed to have been lost by depositors. The scandal also raised significant questions about why American regulators, who had long had evidence of problems at the bank, failed to act quickly.

Under the agreement, Swaleh Naqvi, the bank's chief executive and its second in command, will be extradited to the United States within four months to stand trial on Federal and New York State charges. Mr. Naqvi, who has been under house arrest in Abu Dhabi since shortly after the bank was seized two and a half years ago, is said by investigators to have extensive knowledge of B.C.C.I.'s dealings with many foreign governments over the last 20 years.

In exchange, Abu Dhabi's ruler, Sheik Zayed bin Sultan al-Nahayan, has been assured that he will not face criminal or civil charges in the United States and that a \$1.5 billion lawsuit against him will be dropped. It had been filed by the trustees for First American Bankshares Inc., a banking company in Washington that had been secretly and illegally owned by B.C.C.I.

The agreement was reached on Saturday in Geneva after secret talks between representatives of Abu Dhabi and the Justice Department, the Federal Reserve Board, the Manhattan District Attorney's office and lawyers for First American. Portions of the deal were first reported today in The Washington Post.

Since the bank's closure in 1991, there has been a growing number of reports about the bank's close ties to a wide range of officials, including former President Jimmy Carter; former Atlanta Mayor Andrew Young; Senator Orrin G. Hatch, a Utah Republican, and Clark M. Clifford, an adviser to four Democratic presidents who was Secretary of Defense under Lyndon B. Johnson.

None of the officials has been accused of wrongdoing except for Mr. Clifford, who had headed First American. But the 86-year-old Washington lawyer was never tried because of his poor health. Two months ago, after Mr. Clifford's protégé, Robert A. Altman, was acquitted of fraud charges, a New York court ruled that he must face the charges against Mr. Clifford.

The Central Intelligence Agency has acknowledged that it used the bank for routine activities that it has never spelled out. The bank has also long been identified as the leading financial institution for the illegal drug-smuggling activities of Panama's former leader, Gen. Manuel Noriega, and for those who were concealing and moving illegal cocaine profits for the Medellin drug cartel.

But law-enforcement officials around the country have long said that an understanding of the bank's full range of activities has been elusive because top executives and records were abroad and unavailable. Some investigators, however, have said that B.C.C.I.'s influence may have been overstated.

### Foreign Policy Problem

While it remains to be seen how much new light will be shed on one of the most intriguing and complex scandals of modern times, the settlement with Abu Dhabi at least resolved a long-standing foreign policy problem for the United States Government. For more than two years, Federal and New York prosecutors have been investigating the head of a foreign government that has long been considered an American ally.

B.C.C.I. was run by Pakistani managers, chartered in the banking haven of Luxembourg and the Cayman Islands, and had offices in 70 countries. It was shut down in July 1991 in a worldwide swoop by banking regulators. At the time, 77.4 percent of the bank was owned by Abu Dhabi, which also had sizable deposits in it.

The Governor of the Bank of England, which led the enforcement action shutting the bank's doors, said one reason it was closed was that representatives of the majority shareholders were involved in the fraud. Facing the possibility of civil and criminal charges in the United States, Sheik Zayed had insisted that he had done nothing wrong and had been misled by the bank's executives.

Liquidators have been unable to find much of the shadowy bank's assets, which were reported at \$20 billion shortly before the shutdown. Investigators have characterized the scandal as perhaps the largest financial fraud in history.

In addition to agreeing to surrender records and make available the former bank executives now under his control, Sheik Zayed, who is one of the wealthiest men in the world, will also give up claims arising from the case and make payments that total almost \$500 million.

### International Fund

Some of the money will go to an international fund to compensate the depositors of the bank who lost money and to pay for prosecutions in the United States and elsewhere against Mr. Clifford, Mr. Altman and Mr. Naqvi. As much as \$50 million will also go to First American.

The settlement has three significant financial elements:

million that had been frozen in the United States when B.C.C.I. was closed. Half of that money will go to the fund, and worldwide victims of the bank and half will go into a fund to be used, at the discretion of the Attorney General, to pay for the costs of Federal prosecutions and investigations and other matters.

Another \$20 million loan that Abu Dhabi had made to First American will be forgiven. The loan, which with interest is now worth \$230 million, was made to avert a potential failure of First American.

"The Abu Dhabi government's 37 percent interest in First American, which is valued at about \$170 million, will be taken by the Federal Reserve. It is from this money that the \$50 million will be provided to First American in settlement of its lawsuit against Abu Dhabi.

"The Abu Dhabi parties and the U.S. authorities have entered into an agreement to bring the true B.C.C.I. wrongdoers to justice and expedite compensation to innocent depositors of B.C.C.I.," said Middleton A. Martin, a Washington lawyer for the Sheik and other Abu Dhabi interests. "The agreement shows no client confidence that the cooperation which will result will assist in identifying and bringing the wrongdoers to justice and will demonstrate, once and for all, that they were indeed the largest victim of the fraud perpetrated by the wrongdoers."

For more than 20 years, Mr. Naqvi had been the deputy to Aga Hasan Abedi, the top bank executive and founder of B.C.C.I. Mr. Abedi is said to be in ill health in Pakistan.

NEW YORK TIMES, January 10, 1994, Page D3

# On Trail of Global Fraud: How Bank Case Unfolded

**1972** A Pakistani banker, Aga Hassan Abedi, establishes B.C.C.I. Its leading backers include Sheik Zayed bin Sultan al-Nahayan of Abu Dhabi.

**March 4, 1991** The Federal Reserve Board accuses B.C.C.I. of secretly and illegally buying control of First American Bankshares, the largest bank holding company in Washington, and B.C.C.I. agrees to give up its stake. The Bank of England retains Price Waterhouse to investigate B.C.C.I.

**May 23, 1991** Fed officials tell Congress that they were deceived about the ownership of First American for more than a decade.

**June 1991** Price Waterhouse reports to the Bank of England about widespread fraud at B.C.C.I.

**July 5, 1991** Regulators around the world shut down B.C.C.I.

**July 8, 1991** A Luxembourg court discloses that B.C.C.I. lost in 1990 more than its entire net worth.

**July 12, 1991** The Fed announces disciplinary measures against Mr. Abedi, Swaleh Naqvi and other bank executives.

**July 29, 1991** A New York grand jury indicts the Bank of Credit and Commerce International, Mr. Abedi and Mr. Naqvi.

**Aug. 13, 1991** Under pressure from the Federal Reserve, Clark M. Clifford and Robert A. Altman resign from First American.

**Sept. 5, 1991** A Federal grand jury indicts Mr. Abedi, Mr. Naqvi

and four other B.C.C.I. officials on bank fraud charges.

**Sept. 9, 1991** Mr. Naqvi is arrested in Abu Dhabi.

**Sept. 13, 1991** J. Virgil Mattingly Jr., the general counsel to the Federal Reserve Board, tells Congress that investigators are examining loans from First American to former public officials. None are identified.

**Nov. 15, 1991** New round of Federal indictments against B.C.C.I., Mr. Abedi and Mr. Naqvi.

**July 22, 1992** A grand jury in Manhattan indicts Messrs. Abedi, Naqvi, Clifford and Altman on charges of participating in a scheme to defraud.

**July 29, 1992** A Federal grand jury in Washington indicts Mr. Clifford and Mr. Altman, accusing them of taking bribes from B.C.C.I. to help hide its illegal ownership of First American. They plead not guilty.

**April 1993** Acting on a recommendation of the Justice Department, a Federal judge in Washington dismisses the charges against Mr. Clifford and Mr. Altman. But the Government says that it has reserved the right to bring a new round of charges.

**Aug. 15, 1993** A New York State jury acquits Mr. Altman of criminal charges.

**Nov. 30, 1993** A New York State judge dismisses fraud, conspiracy and bribery charges against Mr. Clifford, ruling that he will never be well enough to stand trial.

NEW YORK TIMES, January 11, 1994, Page D1

## New Phase For Inquiry On B.C.C.I.

### Officials From U.S. Set Abu Dhabi Trip

By KENNETH N. GILPIN

A joint team of investigators from the Justice Department, the Federal Reserve Board and the Manhattan District Attorney's office will go to Abu Dhabi next week to begin the next stage of their investigation of the Bank of Credit and Commerce International, District Attorney Robert M. Morgenthau of Manhattan said yesterday.

The trip is one result of a settlement reached last week and announced on Sunday between American prosecutors and Sheik Zayed bin Sultan Al-Nahyan, the ruler of Abu Dhabi who had been the largest shareholder of B.C.C.I.

While in Abu Dhabi, investigators will begin to pore over B.C.C.I. documents and to interview former bank officials. The lead investigator is Naqvi alone, who was one of two top officers in charge of the bank, amount to more than 1 million pages. Mr. Morgenthau said that under the settlement, Abu Dhabi had been reluctantly granted prosecutors widespread access either to documents or to former B.C.C.I. employees in Abu Dhabi.

#### Making a Deal

The settlement includes the extradition of Mr. Naqvi to the United States within four months to face criminal fraud charges and the granting of access for American investigators to his bank's records and his former offices. For his part, Sheik Zayed received assurances that he would not face criminal or civil charges in the United States if a warrant against him would be dropped.

Along with Gerald M. Stern, the special Justice Department counsel for financial institution fraud, and Thomas J. Meagher, deputy general counsel for the Federal Reserve Bank of New York, Mr. Morgenthau met reporters in his office yesterday to discuss the settlement and its implications.

Given the sweeping terms of the agreement, the officials declined to speculate what the investigation might uncover or where it might lead.

#### A Prosecutor's Outlook

But there was one prediction from Mr. Morgenthau, whose investigation into B.C.C.I.'s activities has thus far produced 11 plea bargains and the recovery of \$1.2 billion in settlements for the rogue bank's depositors and creditors. With that settlement, he said, before long we will be able to go forward and vigorously pursue the B.C.C.I. case."

Lawyers familiar with the negotiations that culminated in the settlement agreement reached over the weekend at the Le Richelieu Hotel in Geneva said several developments were critical in Sheik Zayed's decision to settle.

One was the pending \$1.5 billion civil lawsuit filed over the weekend by trustees for First American Bankshares Inc., a banking company in Washington that had been secretly and majority owned by B.C.C.I.

Also, Mr. Naqvi's defense was being raised in Congress and elsewhere about the Sheik's contention that as a head of state he was immune from prosecution in the case.

Similarly, last month's decision by Sheik Khalid bin Sultan to settle New York and Federal charges that he and an associate looted \$30 million from B.C.C.I. depositors probably played a role in Sheik Zayed's decision to settle, the lawyer said.

Sheik Khalid, a member of Saudi Arabia's principal banking family who was also a B.C.C.I. director and stockholder, agreed to cooperate with prosecutors as part of his settlement.

At the end of Sheik Khalid's settlement, Mr. Morgenthau said he believed that Sheik Khalid could provide much information about the inner workings of B.C.C.I. and about the role played by the royal family of Abu Dhabi.

In short, "it was made clear to them by Justice and the Federal Reserve Board and the Arps & Sterling office that that was a problem that was not going to go away," said Laurence Urgenson, who until Jan. 2 was Acting Deputy Assistant Attorney General and who is now a partner at the law firm of Kirkland & Ellis in Washington.

B.C.C.I. was shut down by regulators worldwide in July 1981 after an audit officially on its books had graded the bank as failing. Officials believe more than \$12 billion was lost by depositors in what is believed to be the largest bank fraud in history.

As a result of the settlement, Sheik Zayed's B.C.C.I.-related problems in the United States disappear, no matter what the subsequent investigation uncovers about him.

"But to prosecutors, according to end-of-the-month figures, I am in exchange for new layers of information about B.C.C.I. and its activities was a worthwhile trade."

"The most important here is that this settlement demonstrates the commitment to get to the bottom of this," Mr. Urgenson said. "Nobody wants to create the impression that we are assuming there is a revelation. But we want to be sure we go through the process."

Mr. Morgenthau said: "This is a chance to review all of the records. We have been doing it on a piecemeal basis, but this is better because we had a chance to do a complete overview."

Mr. Urgenson added that Abu Dhabi's decision to allow Mr. Naqvi to be extradited was an important symbol, no matter what information Mr. Naqvi could provide.

"This demonstrated there is really no safe haven overseas for people like Naqvi, as well as the efforts American law-enforcement officials will go to bring foreign business people to justice," he said.

Mr. Naqvi faces Federal and state criminal fraud charges for his role in B.C.C.I.'s takeover of First American and National Banks.

Mr. Stern from the Justice Department would not speculate when, or if, Mr. Naqvi would stand trial. He should be brought to the United States by mid-May, Mr. Stern said. Joseph E. DiGenova, a former United States Attorney in Washington, will represent Mr. Naqvi. Mr. DiGenova is now a Iran lawyer in private practice in Washington. A phone call to his office was not returned yesterday.

#### Other Possible Actions

Nor would Mr. Stern discuss what if any action the Government might take against Clark M. Clifford or Robert A. Altman after examining the Sheik in Abu Dhabi and talking with Mr. Naqvi.

Mr. Clifford, a longtime adviser to Democratic Presidents, and Mr. Altman, his law partner, were accused by New York and Federal authorities of aiding B.C.C.I.'s takeover of First American,

Mr. Altman was tried and acquitted of mail fraud in August after a lengthy trial in Manhattan. Similar charges against Mr. Clifford were dismissed in the fall because of Mr. Clifford's age — he is almost 87 years old — and his health.

To allow New York's case to proceed, the Justice Department dropped its charges against the two men, but reserved the right to refile the charges.

We've always felt that if the truth were told, it would show that Mr. Clifford and Mr. Altman were innocent of wrongdoing," said Carl S. Rausch, a partner at Skadden, Arps, Slate, Meagher & Flom, who represented Clifford and Mr. Altman. "If Mr. Naqvi comes forward and tells the truth, we think it will support what we have said all along."

FINANCIAL TIMES, January 10, 1994

# US in BCCI deal with Abu Dhabi

By George Graham  
In Washington  
and Andrew Jack

The US has reached a deal with Abu Dhabi that settles some of the counterclaims on the assets of the collapsed Bank of Credit and Commerce International and gives US prosecutors access for the first time to a key BCCI executive.

Representatives of the US Justice Department, the New York district attorney and the Federal Reserve Board, as well as trustees for First American, the US bank illegally controlled by BCCI, agreed on Saturday to drop a civil lawsuit against Sheikh Zayed bin Sultan, the ruler of Abu Dhabi and BCCI's majority shareholder.

They also agreed not to pursue any criminal charges against Sheikh Zayed.

The charges have provoked a diplomatic controversy, with Sheikh Zayed claiming sovereign immunity.

In exchange, Abu Dhabi agreed to give up claims on \$400m (£270m) lent to the money-losing First American, and its 28 per cent stake in the Washington-area bank, and to make available to US prosecutors Mr Swaleh Naqvi, the second-ranking manager of BCCI, who has been under house arrest pending charges in the Gulf emirate. Abu Dhabi has also agreed to provide BCCI liquidators complete access to documents held in the country relating to the bank.

According to reports, the \$400m recovered under the deal will be split between the US government and BCCI depositors, with some of the money used to provide severance pay to First American employees and some to pay for the continuing civil lawsuits brought by First American's trustees against other defendants.

The Justice Department refused to comment on the details of the settlement.

US and New York prosecutors have failed ignominiously in their efforts to pursue the fallout from BCCI's failure in 1991. Mr Robert Altman, a Washington lawyer who was accused of serving as a cat's paw for BCCI in its takeover of First American, was acquitted by a New York jury on charges of bank fraud, and similar charges against Mr Clark Clifford, the former US defence secretary and Mr Altman's partner, were dropped.

Prosecutors have claimed that their inability to question Mr Naqvi, the top assistant to BCCI's founder, Mr Agha Hassan Abedi, has impeded their efforts.

• The United Arab Emirates has issued a formal summons to bring Mr Abedi to trial for his alleged role in the bank's failure, Reuter reports from Abu Dhabi. Mr Abedi, 71 and in ill health, is believed to be living in Karachi. He and 12 other former executives of the bank he founded in 1972 face charges and civil suits worth up to \$10.2bn in Abu Dhabi.

FINANCIAL TIMES, January 12, 1994, Page 6

# BCCI probe springs back into action

## Abu Dhabi ready to release detainees and documents, writes Richard Waters

**T**he flagging investigations into the multi-billion dollar fraud surrounding the Bank of Credit and Commerce International are about to get a new lease of life.

For more than two years, a mountain of documents detailing the fraud have remained locked away in the Gulf state of Abu Dhabi, the bank's majority shareholder.

Also out of reach have been 10 of the bank's top executives, who are being tried on fraud charges in the emirate while eight more have had their passports confiscated.

Under a deal struck with US investigators at the weekend, Abu Dhabi has agreed to make the documents and the detainees available to US prosecutors. The emirate has also agreed to extradite the bank's former number two, Mr Sualib Naqvi, to the US, where he faces fraud charges.

The deal is an important turning point for the US investigators, who have led the worldwide inquiries into BCCI. Alongside Mr Robert Morgenstern, the New York district attorney, they include the justice department and the federal reserve, both of which were also involved in negotiating the agreement.

While claiming success for the work so far, Mr Morgenstern admitted investigations have been held back by lack of access to the records and witnesses held in Abu Dhabi.

The prosecution record over recent months bears out the difficulties.

Less than six months after BCCI was closed, four BCCI entities pleaded guilty to fraud charges and agreed to pay \$550m (£368m) in fines, costs and restitution in the US.

Then, in mid-1992, Mr Kamal Adham, a former Saudi Arabian intelligence chief, pleaded guilty to helping BCCI illegally acquire control of First American Bankshares in the US.

along with an associate.

These successes have not been matched in recent months. Last summer, Mr Robert Altman, a Washington lawyer and former president of First American, was acquitted on fraud charges. Similar charges against Mr Clark Clifford, a former US secretary of state, were dropped due to his ill health.

Other criminal cases have also been dropped. On December 23, Mr Morgenstern gave up charges against Sheikh Khalid

**Abu Dhabi is to extradite the bank's former number two to the US, where he faces fraud charges**

bin Mahfouz, the former head of National Commercial Bank, Saudi Arabia's largest bank, in a deal under which Sheikh Khalid has paid \$225m to meet civil claims against him.

Under the terms of the latest deal, US prosecutors have also agreed not to bring any criminal charges against Sheikh Zayed bin Sultan al-Nahayan, the ruler of Abu Dhabi, or any Abu Dhabi officials.

A beneficiary of this arrangement is Mr Ghanim al Marzuq, head of Sheikh Zayed's department of personal affairs and a man singled out by former BCCI auditors Price Waterhouse as allegedly being fully aware of the fraud long before it was known to regulators.

However, Abu Dhabi officials have maintained they are the biggest victims of the fraud, rather than its perpetrators.

A case against Abu Dhabi officials could yet be mounted

elsewhere. The deal with the US authorities does not preclude prosecutors in the UK, where the bank had its head office, or Luxembourg, where much of it was legally based, from pursuing their own charges.

Yet if the deal closes off some avenues of investigation in the US, it will open others. Mr Naqvi represents the biggest prize so far for US prosecutors. He will be extradited within 120 days, which Abu Dhabi hopes will allow time for its own criminal trial against him to be concluded.

Even if found guilty and sentenced in the Gulf state, Mr Naqvi will be handed over to the US authorities before serving any prison sentence there.

Also, the availability of the so-called "Naqvi files" - more than 1m pages of documents assembled by Mr Naqvi - could provide the sort of ammunition prosecutors need to kick-start a number of investigations.

In addition, Abu Dhabi has agreed to give US investigators access by the end of next week to the 10 men, including Mr Naqvi, who remain in detention in the Gulf emirate.

The new information could bring fresh criminal charges in the US. The Justice department, for one, has said it might yet reopen the case against Mr Altman and Mr Clifford.

The Naqvi files could also provide evidence to back the allegations of bribery of government officials in many of the countries in which BCCI operated, including the UK.

The agreement does not prevent the US authorities from passing on evidence to authorities in other countries.

One man notably absent in this flurry of deal-making is Mr Agha Hassan Abedi, BCCI's chief architect.

At home in Pakistan, and reportedly a very sick man, the elderly Mr Abedi has resisted efforts to move him to either Abu Dhabi or the US for trial.



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#### ABU DHABI IN \$9 BILLION CLAIM AGAINST BCCI OFFICIALS

By Christine Hauser

ABU DHABI, United Arab Emirates (Reuter) - The Abu Dhabi shareholders in the failed Bank of Credit and Commerce International filed a \$9 billion civil suit Monday against 13 former BCCI executives already being tried in the emirate on criminal charges.

A statement sent to Reuters said the claim had been made on behalf of the majority shareholders -- the ruling family of Abu Dhabi and the Abu Dhabi Investment Authority, or ADIA.

"The civil claimants, who were the majority shareholders of BCCI when it was shut down in July of 1991, are seeking \$9 billion in damages for mismanaged and stolen funds," the statement, issued on behalf of the shareholders, added.

BCCI, once one of the world's largest private banking groups, had branches in 69 countries and over \$20 billion in assets before it was shut down amid fraud allegations. The majority shareholders owned 77.4 percent of BCCI at the time.

The civil suit, filed in Abu Dhabi Criminal Court, named BCCI's Pakistani founder, Agha Hassan Abedi, his deputy Sadeq Naqvi, Ziauddin Akbar and 10 other BCCI executives who are on trial in Abu Dhabi, the statement said.

"The civil claim seeks to recoup funds entrusted to Abedi and Naqvi for investment by them on behalf of the ruling family and ADIA," it quoted the shareholders as saying.

The civil claim is based on the criminal charges lodged against the 13 defendants last July. It will be heard with the criminal trial, which is due to resume on Dec. 25.

Eleven of the executives pleaded not guilty in court on Oct. 9 to criminal charges including dissipating funds, forging documents, concealing the bank's deficits and losses and approving false loans.

Abedi and Akbar, who was sentenced in London in September to six years imprisonment for his part in the misuse of more than \$1.2 billion, are being tried in their absence.

Along with Abedi, Naqvi is charged with "using funds entrusted to them by the shareholders and depositors ... in the settlement of fictitious loans."

They are also accused of taking money from the personal portfolios of United Arab Emirates President Sheikh Zaid bin Sultan al-Nahayan and his son, Crown Prince Sheikh Khalifa bin Zaid al-Nahayan, to cover losses made by the bank.

The majority shareholders describe themselves as the biggest victims of the alleged fraud.

The civil claim alleges that over \$3 billion was stolen from the portfolios of Sheikh Zaid and Sheikh Khalifa.

It charges the defendants with "misappropriating the funds

of the BCCI group through the creation of false loans and the servicing of delinquent loans with these funds."

It alleges they misled "the owners into believing the depleted fund was worth over \$4 billion as of December 1989, when in fact it was worth only about \$250 million."

The statement said if the portfolio had been conservatively invested in dollar bonds, it would now be worth \$7 billion.

In addition to the portfolio and other losses the suit seeks to recover \$805 million for the rulers' stake in the bank, \$100 million for ADIA's shares and \$900 million for ADIA's deposits, a representative for the shareholders said.

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